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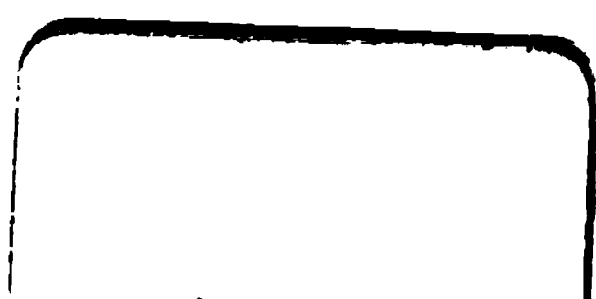
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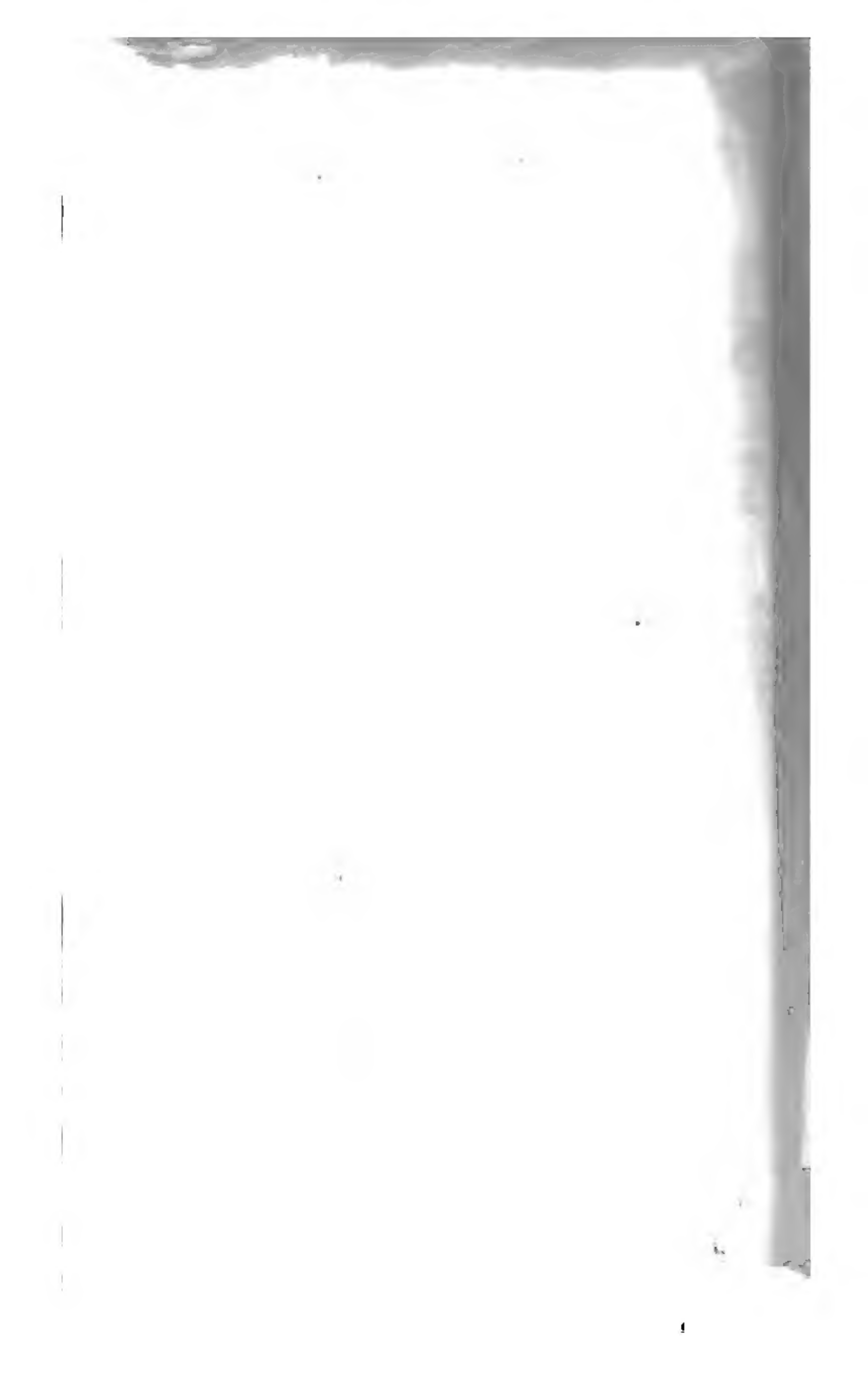
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REPORTS
OF
CASES DETERMINED
IN THE
CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT,

FROM APRIL TERM, 1858, TO MAY TERM, 1861,

BY

HON. NATHAN CLIFFORD, LL D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT, ASSIGNED TO SAID CIRCUIT.

WILLIAM HENRY CLIFFORD,
COUNSELLOR AT LAW,
REPORTER.

VOLUME I.

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JUDGES
OF THE
UNITED STATES COURTS
IN THE FIRST CIRCUIT,
DURING THE TIME OF THESE REPORTS.

HON. NATHAN CLIFFORD, LL. D.,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

HON. ASHUR WARE,
DISTRICT JUDGE OF MAINE.

HON. MATHEW HARVEY,
DISTRICT JUDGE OF NEW HAMPSHIRE.

HON. PELEG SPRAGUE,
DISTRICT JUDGE OF MASSACHUSETTS.

HON. JOHN PITMAN,
DISTRICT JUDGE OF RHODE ISLAND.

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CIRCUIT COURT OF THE UNITED STATES.

MAINE DISTRICT.

APRIL TERM, 1858.

DAVID CARTER, Libellant, *v.* THE SCHOONER BYZANTIUM, TRUE
W. TOWNSEND, Claimant and Appellant.

A lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills of exchange on one of the owners, which bills were produced in court to be surrendered or cancelled.

How far, according to the law of Maine and Massachusetts, the taking of a promissory note, by a simple creditor, is an extinguishment of the original debt.

THIS was an admiralty appeal. The schooner *Byzantium*, owned by parties residing in the State of Maine, arrived at Norfolk, Virginia, in need of repairs and supplies in order to enable her to proceed in safety to her port of destination.

At the request of the master, the libellant furnished the necessary supplies and materials and paid for the repairs. When the vessel was refitted, the master drew two bills of exchange on one of the owners in Maine, in favor of the libellant, for the amount then due him, which bills were accepted by the drawee, but were afterwards dishonored. Suit was commenced on the bills, but was never entered in court.

It was in evidence that the taking of such bills of exchange, in the absence of a special agreement, was not considered, according to the custom of merchants at Norfolk, as a waiver of the maritime lien on the vessel for repairs, materials, and supplies.

In the libellant's account with the schooner, she was credited with the drafts, and appended to the description of them was a re-

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cital in the nature of a receipt, as follows, — “ Which when paid will be in full of account.”

Upon the arrival of the vessel in Maine, a libel *in rem* was filed, claiming to recover on the original account, and the drafts were produced at the trial, and offered to be surrendered. After a hearing, the district judge decreed that the libellant recover the full amount of his account with interest. From this decree the claimants appealed.

Deblois and Jackson, for libellant.

John Rand, for claimant.

CLIFFORD, J. It is insisted by the respondent that the bills of exchange were received by the libellant in payment of the debt contracted for the repairs and supplies, and that the effect of the transaction, under the law of Maine, was to extinguish the original debt, and of course to discharge the maritime lien upon the vessel. The proposition assumes that the transaction is governed by the law of Maine, where the bills were accepted, and not by the law of Virginia, where they were drawn and received by the libellant. When a party, bound to a simple contract debt, gives his own negotiable security for it, whether a bill of exchange or promissory note, the law of Maine, as expounded in the decisions of her courts, presumes as a matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. That rule was adopted in Massachusetts before Maine was admitted as an independent State, and has since been followed by the tribunals of both States in repeated decisions. *Thacher et al. v. Dinsmore*, 5 Mass. 302; *Varner v. Nobleboro*, 2 Greenl. R. 121. Very little embarrassment results from the rule, when its application is kept, as it should be, within the bounds of the principle which the rule itself announces. It is merely a presumption of fact, and may be controlled by circumstances indicating a contrary intention. No such presumption arises at common law, or in Virginia, where the bills were drawn and received. One of the principal reasons assigned for the rule by the courts of Maine and Massachusetts is, that if an action may be maintained for the original debt, the

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debtor may also be sued by an innocent indorsee of the bill or note, and thus be compelled to pay the debt a second time. That difficulty is obviated at common law, and in all the other States where the common-law rule prevails, by requiring the bill or note to be produced at the trial, so that it may be cancelled when the judgment is rendered on the original contract.

None of the decisions in Maine or Massachusetts go further than to hold that the bill or note is a presumption of payment ; and all admit that the presumption is merely one of fact, and may be controlled by circumstances ; in which case the bill or note, as at common law, must be produced, if in existence, to be cancelled. Where the rule prevails, the new security is merely the substitution of the second promise for the first ; and the reasons assigned for it show that it ought not to be adopted except when the remedy upon the former is as effectual as upon the latter. Accordingly, where one of the joint owners of a vessel purchased supplies for her, and gave therefor a negotiable promissory note in their joint names, but without authority from the other owners, it was held that the note was not an extinguishment of the original cause of action, and that the plaintiff might recover on the original promise. *Wilkins v. Reed*, 6 Me. 220. To the same effect, also, is the case of *Descadillas et al. v. Harris*, 8 Me. 298, where it was expressly held, that a negotiable security given in a foreign country is not to be regarded in the courts of Maine as an extinguishment of a simple contract debt created abroad, unless it is so considered by the laws of the country where the contract was made. That case is also a direct authority to the point that the giving of such security is only presumptive evidence of the intent to extinguish the prior simple contract debt, and that, like all other presumptions of fact, it is liable to be repelled by the circumstances. Some of the circumstances which will repel that presumption were considered by the court in that case, and others have been considered in still later cases.

In *Fowler v. Ludwig*, 34 Me. 455, Shepley, C. J., said, if the negotiable paper was accepted in ignorance of the facts, or under a misapprehension of the rights of the parties, it has been held that the presumption might be considered as rebutted. *French*

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v. *Price*, 24 Pick. 13. So if the paper accepted is not binding upon all the parties previously liable ; or if the paper of a third person be received, not expressly in payment, the presumption may be considered as repelled. *Melledge v. Iron Co.*, 5 Cush. 158. Any fraud or undue advantage practised by the debtor in procuring the acceptance of the new security will have the effect to defeat that presumption ; and in such case the creditor may resort to the original promise to recover his debt. *Hervey v. Harvey*, 15 Me. 357.

In determining the question whether the creditor intended to extinguish the original promise, the fact that he held collateral security for the performance of the contract is a material circumstance, and has so been considered in courts where it is held that the unexplained reception of the new security afforded a *prima facie* presumption that it was received in payment ; and the courts of Maine and of Massachusetts have nowhere held that it is not sufficient of itself to rebut the presumption that the creditor intended to accept the negotiable note as a substitute for the original promise, so as to deprive him of his collateral security. On the contrary, the case of *Butts v. Dean*, 2 Met. 76, affords strong ground to conclude that the Supreme Court of Massachusetts is inclined to hold that it would be sufficient. See also *Fowler v. Bush*, 21 Pick. 230 ; *Huse v. Alexander*, 2 Met. 157 ; *Page et al. v. Hubbard et al.*, Sprague's Decisions, 335. Judge Sprague held in the case last named that the doctrine of the courts of Massachusetts does not go further than to consider the taking of a negotiable instrument as a substitute for a pre-existing debt, where that would not impair any security or right of the creditor, and accordingly determined in the case before him that the lien was not displaced or impaired by the subsequent taking of negotiable promissory notes. Without laying down any general rule as applicable to all cases, but confining the decision to the question under consideration, I am of opinion, on the facts of this case, that the bills of exchange were not received in payment of the repairs and supplies, and consequently that the lien was not displaced by that transaction. They were made and furnished in the port of a State other than the one to which the vessel be-

longed, and the bills of exchange were drawn and received by the libellant under the law of Virginia, where the taking of a negotiable security for a pre-existing debt is not presumed to be payment. *The Bark Chusan*, 2 Story, C. C. 467. Those bills were accepted by one only of the owners of the vessel who were liable for the original debt; and there is much reason to conclude from the evidence, that when he accepted them, it was with the intent to defraud the libellant out of his debt. For these reasons, as well as for the one already mentioned, that the account current shows that it was not the intention of the parties that the account should be considered as extinguished until the last bill of exchange was paid, I hold that the lien in this case is not displaced; and as the bills of exchange were produced at the hearing, and remain on the files of the court to be cancelled, the libellant is entitled to recover in this suit. The decree of the District Court is therefore affirmed with costs.

UNITED STATES, BY INDICTMENT, v. PETER WILLIAMS AND
ABRAHAM COX.

An indictment for murder on the high seas is sufficient, although it describe the grand jury as "jurors of the United States."

Circuit Courts of the United States have power to grant new trials, after conviction, for good cause shown, both in misdemeanors and felonies.

Whether the accused, in making confessions before the finding of the indictment, believed themselves to be speaking under oath or not is a question of fact for the jury.

Where it is impossible to discover the body, the fact of death may be proved by other means.

When not made under oath, confessions of the accused are admissible in evidence, although the proof that the crime has been committed, is not, independent of the confessions, plenary.

INDICTMENT for murder on the high seas. It appeared from the evidence that the prisoners sailed from Portland in the brig Albion Cooper, on the 7th of July, 1857, on a voyage to Cardenas, in the island of Cuba. The ship's company consisted of seven persons,—the master, two mates, and four seamen, including the cook and steward. After they sailed,

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nothing further was heard of the persons on board until the 2d of September following the time of their departure from Portland. On that day, in the open sea, on the Bahama Banks, Captain Chase Bryant, of the bark Black Squall, being on a voyage from Philadelphia to Havana, fell in with an open boat in which were three men. He took the boat and men on board his vessel, and continued on his way to Havana. The three men were Peter Williams, Abraham Cox, and Thomas Lahey. Cox and Williams told Captain Bryant that the rest of the ship's company were washed overboard in a squall, while the three survivors were below; that the vessel was so much damaged as to be unmanageable; and that they three, collecting such things as they could from the ship, took to the boat to save their lives. In the boat were found a quantity of provisions and water, a compass and register belonging to the brig, one or two chests of clothing, proved to have been the property of the first and second mates, and a watch, proved to have belonged to the master. On the arrival of the Black Squall at Havana, the defendants and Lahey (who died before the trial) were arrested by the American consul in consequence of information given by Captain Bryant. Cox and Williams were first separately examined upon oath before the consul, and their statements reduced to writing, when their stories were substantially the same as those which they told to Captain Bryant. Lahey was subsequently examined, and his statements implicated Cox and Williams, who thereupon, in the presence of several persons, confessed the murder of the missing members of the ship's company, and described in detail the manner and circumstances of the crime. Their confessions were also taken in writing by the consul, signed by the prisoners, and were offered in evidence, together with proof of the facts already recited.

On this state of facts, the district judge instructed the jury as follows:—

“It is true that in our jurisprudence the accused cannot be convicted on their own confessions, without some corroborating proof of the *corpus delicti*. There must be some proof that the crime has been committed independent of the confessions, but it

is not necessary that it should be plenary proof. There must be evidence tending or conducing to prove the fact; and if it has that tendency, it is proper to be submitted to a jury, and if not, it ought to be excluded as irrevelant."

The jury returned a verdict of guilty against both the accused.

A motion in arrest of judgment was filed, because it did not appear in and by the indictment upon which the prisoners were tried that said indictment was found by a grand jury duly drawn and impanelled, the inquest being therein described as "the jurors of the United States." New trial was also asked, on the ground that there was not, independent of the confessions, such proof of the *corpus delicti* as would warrant a conviction.

George Evans and *T. H. Talbot*, for defendants.

The indictment is bad, because it does not show on its face that it is found by a grand jury.

The final authority upon this point is the constitutional provision. Const. U. S., Amendments, Art. 5th.

There is no intervening statute, and if there were the indictment must conform to the Constitution.

It has never been decided that an indictment in the present form answers the constitutional requirements.

The usage in Maine and Massachusetts may lend its sanction to this indictment; but the usage, however old, cannot make it good. Its age is objectionable, and makes it out of date, being older than the Constitution. *Low's Case*, 4 Greenl. R. 443. But the usage is not uniform. Thach. Cr. C. 284.

It is not enough that the court knows that the indictment has been found by a grand jury; the prisoner has a right to know, and his information must come, if at all, through the indictment.

A confession is not admissible if given under oath. 1 Greenl. Ev. § 225; 1 Arch. Cr. L. 411; 2 Russ. on Cr. 649; 2 Stark. Ev. 36; 4 Hawk. P. C., B. 2, c. 46, § 37.

If the record offered shows that the confessions were given under oath, parol evidence cannot be introduced to contradict it. *Regina v. Wheeley*, 8 Car. & P. 250.

The record does show that the confessions were given under oath. The prisoners were first sworn to tell the truth about the loss of the Albion Cooper; and in their confessions there was no change of subject, and no purgation from the oath. The following are the English cases: *Berwick's Case*, Fost. 10; *Francias's Case*, 1 East P. C. 133; *Lamb's Case*, 2 Leach, 552; *Thomas's Case*, 2 Leach, 637; *Wheeling's Case*, 1 Leach, 311; *Rex v. Eldridge*, Russ. & R. 440; *Rex v. White*, Russ. & R. 508; *Rex v. Tippet*, Russ. & R. 509; *Rex v. Falkner et al.*, Russ. & R. 481; 1 Ph. Ev. 535; 1 Arch. Cr. L. 126. These do not support the rule in *Badgely's Case*, 16 Wend. 53.

The American decisions agree with the text-books in laying down the rule of law, that in capital cases the *corpus delicti* cannot be proved by confessions, but must be proved, before the jury can convict, by independent testimony, by proof *aliunde*.

In 1 Greenl. Ev. § 217, is to be found the full and accurate statement of the law upon this point, and his high authority is supported by other writers of unquestioned accuracy. Cowen & Hill's Notes of 1 Ph. Ev. 532; Whart. Cr. L. § 683; 2 Russ. on Cr. 824, 825 note, and 826.

The American cases are not numerous. 15 Wend. 147; 16 Wend. 63.

The earlier of these, *Hennesey's Case*, is one in which the facts and results favor the motion of the prisoners. The verdict was set aside for want of evidence *aliunde*.

In *Badgely's Case* the conviction was confirmed, and thus the two cases move in opposite directions. *State v. Aaron*, 1 South. 231; *State v. Guild*, 5 Hals. 163; *Stringfellow's Case*, 26 Miss. R. 157.

George F. Shepley, United States District Attorney.

It is not necessary that the word "grand" should precede the word "jurors" in the indictment. Whart. Prec. 14, note *a*.

The court knows, from its record in the case, that the bill has been brought into the court by the grand jury, and that the signature of the foreman is that of the foreman of the grand jury. *Commonwealth v. Read*, Thach. Cr. C. 180.

The words "the jurors for the said United States" as clearly

show they were the grand jurors as in the English indictments the words "the jurors for our Lady the Queen."

This is in accordance with the form invariably used in the Federal courts in Maine and Massachusetts from the adoption of the Federal Constitution. *United States v. Bird*; *United States v. Hobart* (not reported).

From the time of the finding of these indictments, the one the first capital case after the adoption of the Constitution, the other the first in the Federal courts in Maine after the separation, the practice has been uniform, and the same form of commencement in this respect has been observed in the Federal courts as in the State courts in Maine and Massachusetts. Process Act, 4 Stat. at Large, 478.

If there was any doubt upon the question whether the confessions were or not made under oath, the prisoners have had the benefit of that, for the court instructed the jury that if they believed the confessions to have been under oath, or if they believed even that the persons supposed themselves to have been under the influence of an oath, and that these confessions were induced by the influence of that belief, they should disregard them.

The reason for excluding confessions is not that one is less likely to tell the truth under oath than not under oath, but it is that one under examination charged with crime is not bound to criminate himself. Consequently, if the examining magistrate puts him under oath when he is charged with crime, what he says while under oath is not deemed a voluntary statement. He is supposed to have been required to answer instead of having volunteered his statement.

There has been no invasion of the right of a person charged with crime not to be compelled to give evidence against himself.

But at the same time, what a person has testified to under oath while being examined as a witness in favor of or against other parties, or before a grand jury, or before a coroner's inquest, before he was himself charged with crime, has been received. *People v. McMahon*, 2 Parker Cr. R., 663-670, 671, 672; *People v. Hendrickson*, 1 Parker Cr. R., 396; *Wheater's Case*, 2 Moo. C. C. 45.

In *Rex v. Wilkinson*, 8 Car. & P. 662, the confession of the prisoner was received, though not signed by himself or the magistrate who wrote it; and the statements read to the jury.

The general principle is, that a voluntary confession is one of the strongest proofs of guilt, and the highest species of evidence. 2 Stark. Ev. 36; 1 Ph. Ev. (7th ed.) 110, 111; 2 Russ. on Cr. c. 4, § 1, 824; Rosc. Cr. Ev. 37; Gilb. Ev. 137; 1 Greenl. Ev. § 215; *Warickshall's Case*, 1 Leach, 263.

Hence the maxim, *Habemus optimum testem confitentem reum*.

Confessions are divided into two classes, —judicial and extra-judicial. 1 Greenl. Ev. § 216, p. 273.

A judicial confession, voluntarily made and regularly proved, is sufficient, if the jury believe it, to convict the prisoner without any corroborating evidence. 2 Hawk. B. 2, c. 46, § 29; 1 Ph. Ev. (4th Am. ed.) 541; Stark. Ev. Part 4, 53; *Guild's Case*, 5 Halst. 186.

An extra-judicial confession, not subject to any imputation of having been induced by the torture of fear, or the flattery of hope, furnishes sufficient ground for conviction when confirmed by corroborating circumstances. It is not necessary that such corroborating testimony should afford plenary proof of the *corpus delicti*.

Greenleaf, while admitting the law in England to be as contended for, claims that a different rule obtains in the decisions of the courts of the United States, and that, before a conviction can be based upon a confession, there must be independent *proof* of the *corpus delicti*. 1 Greenl. Ev. § 217.

The only cases referred to as sustaining this position are *State v. Long*, 1 Hayw. 455, — a *per curiam* opinion overruled in *State v. Broughton*, 7 Ired. 96, and *Guild's Case*, 5 Halst., 163, in which it is expressly decided that it is only necessary that the confession should *be corroborated*. 2 Hawk. c. 46, § 36, is also referred to. But, so far from sustaining the position laid down in 1 Greenleaf, § 217, both the thirty-sixth section and section thirty-ninth will be found to state a proposition diametrically the opposite.

If by the word “proof” Greenleaf is to be understood as meaning *plenary proof*, his statement is entirely unsupported on principle, or by any authority.

The only explanation that can be made is, that the word "proof" was used by him to mean *evidence* merely. *People v. Hennesey*, 15 Wend. 147 ; *People v. Badgely*, 16 Wend. 53.

Full proof of the body of the crime, the *corpus delicti*, independently of the confessions, is not required by any of the cases ; and in many of them slight corroborating facts were held sufficient. . *People v. Badgely*, 16 Wend. 59.

The prisoners, and the prisoners only, know the fact of the death absolutely and with certainty. Shall they not be allowed to prove by their oft-repeated and voluntary and corroborated statements a fact against themselves, of which their evidence would have afforded plenary proof against any other person ? and if so, upon what principle may they not admit against themselves, and against their interest, and the promptings of every motive, a fact which might have been proved by another person with no better knowledge of the facts, and with less of guaranty that his evidence was not distorted by interest, passion, or prejudice ?

CLIFFORD, J. The indictment in this case was drawn upon the eighth section of the act of Congress of the 30th of April, 1790, which provides, among other things, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death. The charge is in effect that the prisoners, Peter Williams and Abraham Cox, on the 29th of August, 1857, piratically, feloniously, wilfully, and of their malice aforethought, assaulted and murdered one Quinton D. Smith, an American citizen, on board a certain vessel called the Albion Cooper, upon the high seas and out of the jurisdiction of any particular State, and within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court ; and that the prisoners were apprehended and first brought into this district after committing the offence. After verdict and

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before judgment, the prisoners duly filed two motions for the consideration of the court, — one in arrest of judgment, and one for a new trial, upon the ground that improper evidence had been admitted against them, and also upon the ground that the jury had been misdirected in matters of law by the judge who presided at the trial. These motions were argued before this court at a special term held for that purpose on the 15th of March, 1858, and the questions arising under the motions were held under advisement. In stating the conclusions to which we have come, we will follow the order of the argument at the bar, and commence with the motion in arrest of judgment. The only cause assigned in the motion is, that “it does not appear in and by the indictment, upon which the prisoners were tried, that the same was found by a grand jury duly drawn and impanelled.” A brief reference to the act of Congress, of the 8th of August, 1846, and to the record in this case, will show that the persons who served as grand jurors, and who found the indictment, were regularly summoned, impanelled, and sworn. The third section of that act provides, that no grand jury shall hereafter be summoned to attend any Circuit or District Court of the United States, unless the judge of such District Court or one of the judges of such Circuit Court shall in his own discretion, or upon a notification of the district attorney that such jury will be needed, order a *venire* to be issued therefor, provided that nothing herein shall prevent either of said courts in term from directing a grand jury to be summoned and impanelled, whenever in its judgment it may be proper to do so, and at such time as it may direct. It appears by the record in this case, that the Circuit Court met according to adjournment on the 3d of October, 1857, when, on the written request of the district attorney of the United States for this district, it was ordered by the court that *venires* issue for the return of twenty-two grand jurors to attend at the United States courtroom in Portland, in the district of Maine, at an adjourned session of said court, there to be holden at ten of the clock in the forenoon of Tuesday, the 3d of November, 1857, from the towns and cities, and in the proportions therein named. And

the *venires* were accordingly issued on the same day; and the record further states, that the court met again on the 3d of November, 1857, pursuant to the last adjournment, when the *venires* were duly returned, and the persons drawn as grand jurors appeared and were duly impanelled and sworn, and the name of each grand juror, including that of the foreman who was duly appointed, was entered in the record of the case. These proceedings were regular in form, and they show beyond controversy that the jurors were summoned, impanelled, and sworn as a *grand jury* of the United States of America for the First Circuit and District of Maine, and in strict compliance with every requirement of the law in such cases made and provided. Act of Congress, July 20, 1840. Rev. Sts. of Maine, c. 135, §§ 10 – 20. And it also appears from the record, that the same jury, on the 5th of November, 1857, came into court and returned the indictment under consideration, with three others, as true bills against the prisoners at the bar, and the indictments were received by the court and duly filed and entered of record. None of these proceedings are called in question by the counsel of the prisoners, and yet it is contended in their behalf that the indictment itself is defective, because the words used therein, as descriptive of the jurors by whom it was found, are not the same as those employed in the fifth article of the amendments to the Federal Constitution. That article provides that no person shall be held to answer for a capital or otherwise infamous crime (with certain excepted cases) unless on a presentment or indictment of a *grand jury*; and the argument proceeds upon the ground that the words, “the jurors of the United States of America,” which are the words employed in the indictment, are not equivalent to the words “grand jury,” as contained in that provision; and it is insisted that the judgment should be arrested on account of that defect in the indictment. No other exception is taken to the indictment, except that the word “grand.” is omitted before the word “jurors” at the commencement; and it is very properly admitted that the indictment is, in this particular, drawn in perfect accordance with the general practice and precedents in this district, and in all, save one, of the States included in the First Circuit.

Nearly seventy years have elapsed since the judicial system of the United States was organized under the act of Congress, passed on the 24th of September, 1789; and throughout the entire period, since that time, the form of indictments in this district, so far as respects the particular in question, has been the same as the one adopted in this case. While Maine remained a part of Massachusetts, the District Court had jurisdiction in all cases cognizable in a Circuit Court, except appeals and writs of error, and was authorized to proceed therein in the same manner as a Circuit Court; and as early as the first day of June, 1790, the records of that court furnish an example of an indictment, for the crime of murder, in form like the one against the prisoners at the bar; and shortly after Maine was admitted as a State, the records of this court furnish another example to the same effect; and in the case first named, the prisoner was convicted, sentenced, and executed. We have examined these indictments, and are satisfied they were drawn from the precedents in general use in the State composing the district. They are in substance and legal effect the same as the precedents in general use in England immediately prior to the separation of the Colonies from the parent country; and in all formal particulars, including the one in question, they are in exact conformity to the most approved precedents of indictments, used in all the courts of the Commonwealth of Massachusetts, when the Judiciary Act was passed. A formal indictment, in criminal cases, is as necessary in the Federal courts as in the criminal jurisprudence of the States; and yet, when the Federal system of the United States was organized, the form of indictments was not prescribed; and there is nothing contained in any act of Congress, directly referring the matter to any standard, by which their precise requisites can be ascertained. That system was organized, as before remarked, under the act of 1789; and the eleventh section provides, among other things, that the Circuit Courts shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts, of the crimes and offences cognizable

therein ; and it is provided by the twenty-ninth section, that in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve *petit jurors* shall be summoned from thence. And the section then goes on to declare the manner in which juries shall be formed in the Federal courts, and prescribes their qualifications ; and we refer to those provisions as furnishing a clear and decisive indication as to the rule of decision, to which it was the intention of Congress to refer all matters connected with the accusation and trial of offenders in the Federal courts, not otherwise provided for in the Constitution and laws of the United States. The forming of juries is expressly referred to the practice in the State where the trial is had, and to the laws of the State as they existed at the time when the Judiciary Act was passed ; and, by necessary implication, the qualification of jurors was to be determined by the same rule. Some of the provisions of the act of 1790, called the Crimes Act, furnish further confirmation of the proposition, that all matters respecting the accusation and trial of offenders not otherwise provided for were referred to the usages and laws of the States. That act prescribes the punishment, annexed to all the principal crimes against the United States, including treason, misprision of treason, murder, piracy, manslaughter, forgery, and perjury and subornation of perjury, and yet it is silent in regard to the form of indictments in every one of the crimes enumerated in the act, except the two last named ; and the provision made in respect to them we think deserves a particular examination. It is contained in sections nineteen and twenty. Section nineteen provides, in effect, that it shall be sufficient, in an indictment for wilful and corrupt perjury, to set forth the substance of the offence, and by what court or before whom the oath or affirmation was taken, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, otherwise than as aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed ;

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and the twentieth section contains a similar provision in regard to the rule of pleading in an indictment for subornation of perjury. These provisions were not the work of supererogation. On the contrary, they were obviously designed to subserve a useful purpose, and, beyond question, had the effect to modify some existing rule of decision, which would have continued to operate, if those provisions had not been enacted; and the inquiry is, What was that rule of decision which Congress intended to modify by those enactments? It could not have been any rule previously established by an act of Congress, as the national legislature had never before passed any act upon the subject; and certainly it could not have been the rule prevailing in England at that time, as her laws were then foreign laws, and of course they could have no effect in the Federal courts; and still it is obvious that it was the purpose of the act to modify some acknowledged and well-known rule upon the subject, so as to relieve the prosecutor from the strictness in pleading which had previously been required in respect to those offences; and as there is no other rule which Congress could have had in view, we are led to conclude it must have been the common law prevailing in the jurisprudence of the States, and, if so, it affords strong ground for presumption that it was the intention of Congress to refer all the matters not otherwise provided for in respect to the accusation and trial of offenders to the same source for their solution. No other provision was made either in the act of 1789 or the Crimes Act of 1790, respecting the form of indictments, and none whatever in regard to the mode of conducting the trial after the jury are sworn, or the rules of evidence by which the guilt or innocence of persons accused of offences was to be ascertained or determined. Matters of such moment could not have been overlooked, for the reason that, without some regulation upon the subject, the system itself would have been imperfect and useless; and as there is no other standard by which they can be determined, it is clear that they must be referred to the laws of the States and the usages and customs of the courts at the time when the judicial system of the United States was organized. *United States v. Reed et al.*, 12 How. 761.

The motion in arrest of judgment is therefore overruled.

Several propositions are embraced in the motion for a new trial, which we will now proceed to examine in the order in which they were presented by the counsel of the prisoners. Before doing so, however, we desire very briefly to notice a preliminary question, whether this court, under the Constitution and laws of the United States, possesses the power to grant a new trial in a capital case, as it would be useless to consider the merits of the motion, if there is no power conferred upon the court to grant it. It was held by Judge Story, in *United States v. Gibert et al.*, 2 Sumn. 19, that a new trial could not be granted in a case very much like the present. That conclusion was based chiefly upon the ground that a second trial, though allowed at the request of the accused, would be a violation of that provision of the Constitution which provides in effect that no person "shall be subject for the same offence to be twice put in jeopardy of life and limb." Judge Davis dissented at the time, and held that the prohibition was intended for the security and benefit of the accused, and as such, that it might be waived and relinquished; and such is now the settled doctrine in all the Circuit Courts of the United States, and in every State court where the subject has been considered. Since the date of that decision, the point has been discussed in twenty of the States of this Union, and in every instance it has been held that a new trial may be granted on the application of the accused. Many of the cases are collected in *The People v. Morrison*, 1 Parker Cr. R. 624, to which we refer for a summary of the authorities upon the subject. They are also to be found in 2 Ben. & H. Leading Crim. Cases, 464, where the whole subject is very satisfactorily reviewed. New trials were unknown in the ancient common law, either in civil or criminal cases; and after the power of courts in this behalf was fully established in the time of Lord Mansfield, it was seldom and perhaps never exercised in criminal cases above the grade of misdemeanors. In later times, new trials are granted in England in felonies as well as in the lower offences, whenever the error is one which cannot be satisfactorily corrected in any other way. *Regina v. Scaife et al.*, 2 Den. & Pea. 281.

Errors will sometimes occur in a jury trial, and there must be, as there always has been, some mode by which they can be corrected ; and no reasoning can be satisfactory, whatever may be its basis, which would deprive courts of justice of the power to set aside a verdict at the request of one who had been illegally convicted ; and accordingly, we hold that this court has the power to grant a new trial, after conviction, for good cause shown, both in misdemeanors and felonies.

The first cause assigned for a new trial is that the court permitted evidence to be given to the jury, against the objection of the prisoners, which was not by law admissible. That complaint has reference to certain statements, made and signed by the prisoners on the 9th and 10th of September, 1857, before Thomas Savage, acting vice-consul of the United States for the port of Havanna, and it is insisted that those statements were made when under oath, and, therefore, were not voluntarily made. Judge Ware sustained the doctrine contended for by the counsel of the prisoners, that confessions made under oath were not admissible, and the depositions were not introduced.

We have examined both the depositions and the statements subsequently prepared, and on the face of the papers, we think, it is clear that the latter were not made under oath, just as clear as it is that the former were so made.

On this point there can be no doubt, and yet it is insisted that the statements might have been made by the prisoners under the impression that they were speaking under oath, and if so, that they were not voluntarily made and ought not to have been received. That difficulty was suggested to the judge at the trial and was fully obviated by him in the instructions given to the jury. The jury were told that if the prisoners, when they made those statements, believed that they were speaking under oath, then the statements ought to be laid out of the case ; and we think the instruction was sufficiently favorable to the prisoners, and furnishes to them no ground of complaint whatever. Whether confessions, when made under oath, are or are not admissible, it is not necessary now to determine, as the ruling on this point was in favor of the prisoners, and, therefore, we forbear to say more upon the subject.

The second cause assigned in the motion for a new trial is, that there was not sufficient proof that the statements were ever read to the prisoners or either of them before they were signed. Whether those papers were or were not read to the prisoners was a question of fact for the jury, and must have been found in the affirmative ; and their finding ought not to be disturbed, unless it was against the evidence or, at least, against the weight of the evidence in the case. Two witnesses, Savage and Bryant, testify positively that the statement of Williams, which was first offered, was read to him ; and in respect to the other, it does not appear that any such objection was taken to it at the trial, and it is now said in argument for the United States that witnesses were present by whom the fact could have been proved, and were not called because the objection was not made.

Another answer to this ground of complaint arises from what does satisfactorily appear in the report of the case. Cox was present when Williams made his statement, and, as one of the witnesses says, " kept putting in a word," while the consul was reducing it to writing. That statement was read to Williams, and, of course, in the hearing of Cox, as he was present, and must have been well understood by both ; and as Cox's statement is substantially the same, and was only omitted till the following day for want of time to take it, we are unable to perceive any reason to doubt that it was understandingly made and signed. It bears his signature, and there is not a word of proof tending to show that it was unfairly obtained or that he did not fully understand its contents.

Another cause assigned in the motion for a new trial is that there was not sufficient legal evidence to authorize the jury to find that Quinton D. Smith had come to his death in any manner, and none to find that he had come to his death by violence ; and the same questions are raised under a fourth proposition in various forms, alleging that the jury were misdirected by the presiding justice at the trial in matters of law.

Motions for a new trial in the Federal courts are usually drawn up by the counsel of the party who is dissatisfied with the verdict, and in general are not required to be submitted either to

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the opposite counsel or to the court for revision until the hearing, and no serious inconvenience has resulted from the practice, as all such motions are addressed to the discretion of the court, and are made and filed subject to revision, and where they contain any errors in the recital of the facts or the instructions of the court, they are, as a matter of course, expected to be corrected.

There being no authentic report of the evidence, the facts of the case must be determined from the minutes of the judge who presided at the trial.

[At this point the court recapitulated the facts disclosed in the evidence and the confessions of the prisoners, and also quoted that part of the charge of the district judge applicable to these facts. The portion of the charge thus recited is given above.]

The counsel do not contend for the proposition that a conviction can in no case be had without a discovery of the body of the person alleged to be murdered, although there are some decided cases which at first reading seem to favor that view of the law ; and such undoubtedly is the general rule in the law of felonious homicide, and it is one which ought always to be enforced whenever direct proof exists and it is practicable to obtain it. Lord Hale said he would never convict any person of murder or manslaughter, unless the fact was proved or the body found dead. Cases, however, have occurred, and it is greatly to be feared may hereafter occur, where the application of this rule would secure impunity to the murderer, and therefore would be unreasonable, as it would be in the highest degree prejudicial to the course of criminal justice. A murderer would only have to consume the body by fire, or decompose it by chemical means, or sink it in the depth of the sea, and the laws of society would be powerless to punish the offender.

That question was very satisfactorily considered by Judge Story, in *United States v. Gibert et al.*, 2 Sum. 19, where he said, when speaking of the application of that rule in a case very much like the case at bar, that " it certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes. In cases

of murder upon the high seas, the body is rarely if ever found, and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

It follows, therefore, that in cases where the discovery of the body after the crime, is impossible, the fact of death may be proved by other means. Burr. on Cir. Ev. 679; *Rex v. Hindmarsh*, 2 Leach, 569; Best on Presumptions, 204, 205.

Many other cases might be cited to the same effect, but we deem it unnecessary, as the law appears to be well settled upon this point, and it is not controverted by the counsel of the prisoners. Assuming, then, that where it is impossible to discover the body, the fact of death may be proved by other means, the inquiry is, by what other means may that proof be made. Must it in all cases be direct proof, or may it be proved by strong and unequivocal circumstances which render it morally certain and leave no reasonable doubt that such is the fact? Not a doubt is entertained by this court, that it may in the case supposed be proved in either of the modes suggested; that is, it may be proved by direct evidence, or where such does not exist, it may be proved by cogent circumstances, provided they are sufficient to produce conviction on the mind of the jury and to exclude every reasonable doubt. It must be so, else the laws for the punishment of felonious homicide are insufficient to reach the secret offender, provided he has the opportunity and employs the means to destroy the body.

We are not aware that the principles thus far advanced are denied in behalf of the prisoners; and yet it is insisted that "a confession is not sufficient to justify a conviction in capital cases, unless the *corpus delicti* be proved by independent evidence"; which in effect, as we understand the proposition, denies that it is admissible at all until the *corpus delicti* is first proved, and then only as it respects the agency of the accused. Confessions are never admissible unless they were freely and voluntarily made; and when so made they are in general regarded as strong proof of guilt, as it is not reasonable to suppose that a person

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really innocent would voluntarily subject himself to infamy and punishment. 2 Stark. Ev. 36 ; 1 Ph. Ev. (10 ed.) 110, 111.

“ Confessions are received in evidence or rejected as inadmissible,” said Eyre, C. B., “ under a consideration, whether they are or are not entitled to credit. A full and voluntary confession is deserving of the highest credit, because it is presumed to flow from a strong sense of guilt, and therefore it is admitted as proof of the crime to which it refers ; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.” *Warickshall's Case*, 1 Leach, 298. Confessions, in order to be of any weight, should be deliberately and understandingly made, and it ought also to appear that they are founded upon a full knowledge of the facts to which they relate. Suppose a seaman should confess that he drowned his captain by throwing him into the sea, and it should appear that it was done in the darkness of the night, and that other vessels were near, or that it was near the shore, all would agree that the confession should have but little or no weight to prove that death actually ensued, as the admission would not be founded on knowledge ; and the testimony of a witness under the same circumstances and to the same facts would be entitled to no greater weight for the same reason ; because neither the seaman who threw the man overboard, nor the witness who saw it, could know that death actually took place. That distinction was well taken in *Rex v. Hindmarsh*, 2 Leach, 569, and it is one which ought never to be overlooked in this species of evidence. In that case it appeared that while the ship was lying off the coast of Africa, where there were several other vessels, the prisoner was seen in the night to take the captain up in his arms and throw him into the sea, after which he was never seen or heard of ; but that near the place on the deck where the captain was seen was found a billet of wood, and the deck and parts of the prisoner's dress were stained with blood. On these facts it was objected, that the *corpus delicti* was not proved, as the captain might have been taken up by some of the other vessels. But the court, while admitting

the rule, left it to the jury to say, whether the deceased was killed before his body was cast into the sea ; and the jury found in the affirmative, and the prisoner was convicted, and on a case reserved the conviction was approved by all the judges.

According to the statements of the prisoners in this case, Quinton D. Smith was dead before he was sewed up in old sails with weights and thrown overboard. His death is certain if the confession is true ; whereas, in the case above supposed, everything confessed might be true, and yet the captain might have been alive. A careful attention to this distinction, and to the facts of each case, will explain what may otherwise seem to be an inconsistency in several of the authorities cited at the bar. The confessions in this case were free and voluntary, and are so comprehensive as to make it certain, if they are true, that death actually ensued, through violence inflicted by the prisoners, many hours before the body was thrown overboard ; and having been made in respect to a case where the discovery of the body is impossible, and where the death, therefore, according to the well-settled rule of law, may be proved by other means, why are they not admissible, and, if admissible, who shall judge of the credit to which they are entitled except the jury ? There can be but one answer to the question, when viewing it merely in the light of principle ; and yet courts of justice in such cases are required to act with the greatest caution, and ought not to shut their eyes to the fact that a too ready credence of confessions has sometimes led to improper convictions ; and in view of experience, perhaps it would be safer in every case, where there are no corroborative circumstances, to recommend an acquittal.

“Confessions,” says Mr. Greenleaf, “are divided into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate or in court in the due course of legal proceedings, and it is essential that they be made of the free will of the party and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient

to found a conviction, even if to be followed by a sentence of death ; they being deliberately made with the deepest solemnities, under the advice of counsel and the protecting caution and oversight of the court. . . . Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate or in court, and they embrace not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied." All confessions of this kind, it is admitted by the learned author, are receivable in evidence, being proved like other facts, and are to be weighed by the jury ; and where it appears that they were freely and voluntarily made in respect to facts within the knowledge of the accused, we have no doubt that the rule, as stated, is correct ; and if so admissible, it is difficult to say that the jury are not the sole judges of the credit to which they are entitled. And yet it has been gravely questioned whether such confessions, when uncorroborated by any other proof of the *corpus delicti*, are of themselves sufficient to warrant a conviction in a capital case. Mr. Greenleaf strongly doubts their sufficiency, though he admits that they are receivable in evidence ; and he adds emphatically, that in the United States a prisoner's confession, where the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction ; and in support of the proposition he refers to the following authorities. *Guild's Case*, 5 Halst. 163 ; *Long's Case*, 1 Hayw. 524 ; Hawk. P. C. B. 2, c. 46, § 18. Considering the language employed by that author, it is somewhat doubtful how far he would carry the doctrine ; and if it is to the extent that the *corpus delicti* must be fully proved independently of the confession, we are not prepared to adopt it, as in that view the admission of the confession would be useless, except to prove the agency of the accused, and would operate as an exclusion of the confession for any other purpose ; whereas, if freely and voluntarily made, it is clearly admissible as evidence in support of any element in the charge to which it applies.

Full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required, says Nelson, C. J., in *The People v. Badgley*, 16 Wend. 59, by any of the cases ; and

in many of them slight corroborating facts were held sufficient. The cases cited by Mr. Greenleaf do not assert a different doctrine; the one first cited distinctly affirms the same principle, and *Long's Case*, when carefully examined, is to the same effect. It merely asserts that naked confessions, unattended by circumstances, are not sufficient to warrant a conviction; but the court admit that where the circumstances related in the confession are proved to have already existed, that the confession may be evidence sufficient to authorize the jury to find the prisoner guilty. Hawkins says, B. 2, c. 31, § 1, that an express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received after the plea of not guilty recorded, notwithstanding the repugnancy. Russell says, that the highest authorities have now established that a confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence. 2 Russ. (7th ed.) 824. And it must be admitted that the cases cited in support of the text sustain the proposition. *Wheeling's Case*, 1 Leach, 311, note; *Rex v. Eldridge*, Russ. & R. 439; *Rex v. Falkner*, Russ. & R. 481.

While we admit that the cases cited appear to sustain the proposition, we still think that the proposition itself admits of essential qualifications, without which we should not be prepared to adopt it. A *corpus delicti* is always made up of two elements, in respect to which there is an important distinction, which should never be overlooked in an investigation of this kind. In felonious homicide they consist, first, of the fact of death; and, secondly, of other facts or circumstances showing the criminal agency of another: and in all cases the former constitutes the basis of the latter inquiry, and in general ought to be first proved. And even supposing that a free and voluntary confession may, under some circumstances, be sufficient, as where the body has been destroyed by fire, or consumed by chemical means, or sunk in the sea after life was extinct, yet it could only be so where the particulars given in the confession itself furnish the most satisfactory proof that the party confessing had full knowledge that death had actually taken place through his

own acts. No such question arises in this case, and therefore we forbear to pursue the inquiry. Where the fact of death is fully proved by other evidence, no reason is perceived why the free and voluntary confession of the party, if deliberately made, may not be sufficient to establish the other element of the *corpus delicti*, provided it satisfactorily appears that other evidence does not exist.

The best proof of the *corpus delicti*, as well as the most effectual means of ascertaining its cause, is the finding and the inspection of the dead body, and a resort to other evidence, in respect to either element of which it is composed, ought never to be allowed except in cases where the discovery of the body is impossible. Where the body cannot be found, the fact of death may be proved by cogent and unequivocal circumstances, provided they are sufficient to establish the fact beyond every reasonable doubt. Whether, under any circumstances, a free and voluntary confession, deliberately made, would be sufficient without corroboration, it is not necessary now to decide, and therefore we forbear to express any decided opinion upon the subject, as no such question is raised in the instructions given to the jury, and none such arises on the evidence reported by the judge who presided at the trial. Many facts and circumstances were proved at the trial, independently of the confessions, tending to show that the crime had been committed; and some of the circumstances thus proved were of a character strongly to implicate the prisoners in the transaction. It was proved that the prisoners left Portland on the 7th of July, 1857, in the same vessel with Quinton D. Smith and the other men supposed to have been murdered, and that neither Smith, the other men, or the vessel have ever since been seen or heard from except through the confessions of the prisoners and of Lahey, who died before the trial. Neither the vessel nor the officers or men ever arrived at the port of destination or returned to the home port. At the time, or about the time, when the vessel should have arrived at Cardenas, the prisoners were picked up in a boat in the open sea, which boat was subsequently brought home and identified, and proved to be the only boat of the vessel in which they sailed.

It was tarred inside in a manner to indicate that they had not left the vessel without preparation, and that fact was still more strongly indicated by the circumstance that they had in the boat the ship's compass, and a supply of water and provisions. They had in their possession also the watch of the captain, and the clothing of the murdered men, and all these articles were fully identified at the trial, as was the ship's register, which was also in their possession. After they were picked up, they gave contradictory and false accounts of what had occurred before they left the vessel, and persisted in the falsehood until Lahey disclosed the truth; and when they saw that detection was certain, they freely and voluntarily confessed their crimes. All these facts and circumstances were fully proved at the trial before the confessions were admitted, and we think they were of a character to be regarded as tending to prove, not only that the crime had been committed, but that it had been committed by the prisoners; and in that view of the case we are satisfied that the instructions given to the jury were correct. There is no decided case, either English or American, which asserts a contrary doctrine. It was supposed by the counsel at the argument that the Mississippi case constituted an exception, but we think it does not. The question there was, whether the extra-judicial confessions of a prisoner charged with a capital felony is sufficient *without any proof whatever* of the *corpus delicti*, independent of the confession; and it was held that the confession was not sufficient. *-Stringfellow v. The State*, 26 Miss. 169. See also *State v. Cowan*, 7 Ired. 239; *State v. Aaron*, 1 South. 231; *People v. Hennessy*, 15 Wend. 147; Burr. on Cir. Ev. 495; Best on Presumptions, § 257, p. 382. Other cases to the same effect might be cited; but these already referred to we think are sufficient to show the state of the law in the United States, and it will be seen that they do not sustain the doctrine that the *corpus delicti* must be fully proved by evidence independent of the confession. It is doubtful whether Mr. Greenleaf intended to lay down any such rule, and if he did we are not prepared to adopt it, as it does not appear to have the sanction of any decided case either in England or the United States. All that can be required is,

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that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine upon its sufficiency.

The motion for a new trial, therefore, is overruled, and there must be judgment on the verdict.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1858.

JOHN BIGELOW *et als.* v. WILLIAM ELLIOT AND STANFORD HOVEY.

When two or more persons agree that each shall contribute capital or labor for the purpose of carrying on a business, and that the profits shall enure to their joint benefit, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement, and even though they may have expressly stipulated to the contrary.

Community of profit is the true criterion whereby to determine whether any agreement for the carrying on of business constitutes a partnership; but if one receives as a compensation for his services, or as rent, a stated portion of the profits, as a measure of the amount of his salary, or the mode of payment, he will not on that account be liable as a partner.

Comments upon *Denney v. Cabot et al.*, 6 Met. 92. Where one participates in the profits of a business, ostensibly carried on by another, he is equally liable, when discovered, for debts of the concern, contracted during the time of such participation, to creditors without knowledge of the actual relations of the parties when the credits were given. Partnership in such cases is a conclusion of law upon the facts; but secrecy on the part of the dormant partner, and want of knowledge of the actual relations of the parties on the part of the creditor, are essential elements of the liability.

Dormant partners, or those held to be such by mere implication of law, need not in any way give notice of the dissolution of partnership.

THIS was an action of assumpsit for goods sold and delivered, and the case was submitted to the court upon an agreed statement of facts. The plaintiffs claimed to recover of the defendants as partners in trade under the firm name of S. Hovey.

Hovey did not appear, and was defaulted. Elliot appeared

and pleaded the general issue. It was admitted that the defendants, on the 2d of April, 1856, entered into an agreement, which in substance provided as follows: Elliot was to furnish a stock of merchandise, consisting of watches, jewelry, and certain fancy goods, to an amount not less than two thousand dollars, and as much more as he might desire, and place the same in a store or salesroom to be provided by Hovey, and to allow him to sell at retail therefrom, upon certain specified conditions, namely, Hovey was to keep accurate entries of the sales made from the stock, rendering an account of the same as often as Elliot might desire, and pay all the money to him on demand as fast as collected; he was to be responsible for the safe-keeping and return of all the merchandise intrusted to his care as above, or the avails thereof, and of all goods sold on credit, but was not to sell any goods on credit to an amount exceeding one hundred dollars, without consent of Elliot, in writing, specifying the parties and merchandise. All the expenses of the concern, including rent, lights, fuel, clerk-hire, insurance, taxes, and other necessary incidental expenses, were to be paid from the profits of the concern, except the pay for the services and personal expenses of Hovey, for which no provision was made in the agreement. No clerk or workman was to be employed about the concern except such as were approved by Elliot. All watch-work or other jobs taken or done at or by the concern were to be set down as sales and profits, and divided as such.

The net income, after paying expenses "as above," was to be equally shared between the contracting parties. Hovey could purchase, on his own account, any goods or merchandise that he might see fit, expose the same for sale, and sell in the store with Elliot's merchandise, provided that the profits on the same were equally shared "as above." Elliot was to have the privilege of selling any goods in the store to his friends and customers, or of taking any article therefrom to sell, but the profit on any article thus sold in the store was "to go to the concern," except that on musical instruments, which was to be the exclusive property of Elliot. Merchandise was to be furnished at cost, or regular six months' prices, and Hovey had the privilege of seeing the bills.

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A true account of all exchange trades was to be kept, and the result of the same to be set down as trade, and the profit carried out accordingly. Finally, it was agreed that either party might terminate the contract at pleasure.

In pursuance of this agreement, Hovey hired a store in his own name and carried on business from April, 1856, to January, 1857,—Elliot's interest in the stock and business remaining a secret. During this time goods to the amount of four thousand eight hundred and sixty-six dollars and fifty-seven cents were furnished by Elliot, and Hovey put in goods to the amount of about four thousand dollars. This suit was brought to recover for goods so purchased by Hovey, and which constituted a part of the goods so put into the store by him. These goods were sold to Hovey by the plaintiffs, who were ignorant of the agreement between him and Elliot, and the purchase was made without consultation with Elliot and without his knowledge. At the time of the sale the plaintiffs had no knowledge of the existence of the written agreement, or that Elliot had any interest either in the store or the goods, and remained in ignorance of it till April, 1857, when Elliot as trustee in another suit made the disclosure. On the 12th of January, 1857, Elliot sold the balance of the goods furnished or put into the store by him to Hovey, and they made a settlement of the business done under the agreement up to the 1st of the same month. In that settlement Hovey accounted to Elliot for one half the profits of the business, deducting expenses, and gave him his note for the amount. Elliot then took a mortgage on all the goods in the store to secure his claim against Hovey.

If the court came to the conclusion that the action could be maintained against both defendants, then judgment was to be entered in favor of the plaintiffs for the whole amount claimed, with interest from the date of the writ; but if the court was of the opinion that it could not be sustained against Elliot, the first-named defendant, then judgment was to be entered in his favor for his costs.

Clark and Smith, for plaintiffs. It is not essential in all cases, to constitute a partnership, that there should be both community

of interest in the capital stock and in the profits. If there is community of profit, they are partners. Story on Partnership, § 27; *Ex parte Hamper*, 17 Ves. Jr. 404; *Reid v. Hollinshead*, 4 B. & C. 867; *Smith v. Watson*, 2 B. & C. 401; *Hisketh v. Blanchard*, 4 East, 144; 1 Parsons on Con. 158; Bisset on Partnership, 4; *Dook v. Swann*, 8 Greenl. R. 170; *Cobb v. Abbott*, 14 Pick. 289; *Bostwick v. Champion*, 11 Wend. 571. There must be a similar common interest in the losses of the concern to some extent, at least so far as they constitute a charge upon or a diminution or deduction from the profits, since the net income is alone to be shared, and there must be in all cases a deduction of the losses to a greater or less extent, according to the agreement of the parties, in order to ascertain what are the profits. Story on Partnership, §§ 19, 23, 60; *Bond v. Pittard*, 3 M. & W. 359; *Gilpin v. Enderby*, 5 B. & C. 954; *Cheap v. Cramond*, 4 B. & Ald. 663; *Ex parte Langdale*, 18 Ves. Jr. 300. That the parties are such partners is to be determined by their actual participation of the profits, which is held to require of them a participation of the losses, because it diminishes the fund from which the losses are to be paid. 1 Parsons on Con. 133; *Grace v. Smith*, 2 W. Bl. 998; *Waugh v. Carver*, 2 H. Bl. 235; S. C. 1 Sm. L. C. 821 and notes; Bisset on Partnership, 9. As to third persons the defendants were partners.

Morrison and Stanley, for Elliot. Hovey's position was simply that of an agent, receiving a portion of the profits as compensation. *Clark v. Reed*, 11 Pick. 446; *Hesketh v. Blanchard*, 4 East, 143; *Ex parte Hamper*, 17 Ves. Jr. 403; *Thompson v. Snow*, 4 Greenl. R. 264; *Wilkinson v. Frasier*, 4 Esp. 182; *Meyer v. Sharp*, 5 Taunt. 74; *Rice v. Austin*, 17 Mass. 197; *Miller v. Bartlett*, 15 S. & R. 137; *Loomis v. Marshall*, 12 Conn. 69; *Harding v. Foxcroft*, 6 Greenl. R. 76; *Mair v. Glennie*, 4 M. & S. 240; *Good v. McCartney* 10 Texas, 193; *Johnson v. Miller*, 16 Ohio, 431; *Mason v. Potter*, 26 Vt. 722; *Clement v. Hadlock*, 13 N. H. 185; *Chandler v. Brainard*, 14 Pick. 285; *Knowlton v. Reed*, 38 Me. 246; *Muzzy v. Whitney*, 10 Johns. 226; *Holmes's Case*, 2 Lewin, C. C. 256; *Newman v. Bean*, 1 Fost.

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93 ; *Judson v. Adams*, 8 Cush. 556 ; *Turner v. Bissell*, 14 Pick. 192 ; *Wilson v. Whitehead et als.*, 10 M. & W. 503 ; *Pott v. Eyton*, 3 C. B. 32. So in *Denny v. Cabot*, 6 Met. 82, the question at issue is well considered, and the doctrine of *Turner v. Bissell* is approved. And see also *Dry v. Boswell*, 1 Camp. 329 and note ; *Gibson v. Stevens*, 7 N. H. 352 ; *Grace v. Smith*, 2 W. Black. 998 ; *Blanchard v. Coolidge*, 22 Pick. 151 ; *Hoare v. Dawes*, 1 Dougl. 371 ; *Boyer v. Andersen*, 2 Leigh. 550.

CLIFFORD, J. Partnership is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Story on Partnership, § 2. Other writers define it as an agreement between two or more persons for joining together their goods, money, labor, and skill, or either or all of them, for the purpose of advancing lawful trade and of dividing the profits and losses arising from it, proportionably, or otherwise, between them. They may be divided into general and special or limited partnerships. General partnerships are properly such where the parties carry on all their trade and business for their joint benefit and profit, and it is not material whether the capital stock be limited or not, or the contributions of the parties be equal or unequal. *Willet v. Chambers*, Cowp. 814. Special partnerships are those formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties or one of them. When they extend to a single transaction or adventure only, such as the purchase and sale of a particular parcel of goods, they are more commonly called limited partnerships, but the appellation is indiscriminately applicable to both classes of cases. Various other subdivisions are also employed to designate the different phases of this relation, which need not be repeated, as mere definitions cannot avail much in determining the question under consideration. All such commercial and business relations are usually created by the mere act and consent of the parties, and in this they differ from corporations which require the sanction of public authority either express or implied. Ang.

& A. on Corp. (4th ed.) § 41. Such consent of the parties may be testified either in express terms or by articles of copartnership or positive oral agreement, or the assent may be tacit, to be implied solely from the acts and dealings of the parties. An implied or presumptive assent has equal operation with one that is express and determined; and it may be laid down as a general proposition, that persons having a mutual interest in the profits and loss of any business carried on by them are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to contract that relation. Decided cases have established the doctrine, that when two or more persons agree that each shall contribute capital or labor for the purpose of carrying on a trade or business, and that the profits arising therefrom shall enure to their joint benefit, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement. 1 Sm. L. C. (ed. 1855) 982. All of the writers and decided cases agree that persons engaged in trade or business may become partners as to third persons in mercantile and business transactions by a participation in the profits of the trade or business, even in cases where the participant may have expressly stipulated against some of the usual, and, as between themselves, material incidents to that relation. Difficulties frequently surround the inquiry, arising out of the peculiarities or complicated character of the stipulations, and hard cases have induced courts of justice to seek for qualifications and exceptions to the general doctrine as expounded and laid down in the early decisions at common law upon the subject. While there is no diversity of opinion in regard to the general doctrine that such may be the result, some of the attempts which have been made to qualify and restrain and limit it have given rise to many inconsistent, and in some instances contradictory, decisions.

One of the earliest cases usually cited in support of the general doctrine is that of *Grace v. Smith*, 2 W. Black. 997, which was decided before the Revolution. It was an action against the de-

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fendant as a secret partner with another, to whom the goods had been delivered, and who had become a bankrupt. They had recently been partners, but had dissolved, and the defendant had ostensibly retired from the firm. He retired on the terms that the stock and debts should be carried to the account of the other partner, but agreed to loan him a certain sum or let it remain in his hands for seven years, at five per cent interest, with a certain yearly annuity for the same period. On a motion for new trial it was held, that the true criterion whereby to determine the question of liability was to inquire whether the ostensible owner agreed to share the profits with the retiring partner, or whether the latter only relied on the profits as a fund for payment; and De Grey, C. J., remarked, that every man who has a share of the profits of a trade ought also to bear his share of the loss, adding that if any one takes a part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. That principle is more satisfactorily stated in *Waugh v. Carver*, 2 H. Black. 247, which was decided in 1793, and is generally regarded as the leading case upon the subject under consideration. In that case, Eyre, C. J., held, without qualification, that he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. He also remarked to the effect that the principle as stated was the foundation of the decision in *Grace v. Smith*, and emphatically added, I think it stands upon the fair ground of reason. Both of these cases were cited and approved in *Cheap et als. v. Cramond*, 4 B. & A. 663; and the same principle was reiterated in substantially the same language.

In the case last named a merchant at home had recommended consignments to a merchant abroad, and it was agreed that the commissions on all sales of goods, recommended by one house to the other, should be equally divided, without allowing any deductions for expenses; and it was unanimously held by the court of the King's Bench that this was a participation in profit, and con-

stituted a partnership between the parties to the extent of those transactions.

Abbott, C. J., in delivering judgment, stated the principle of the decision to be, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter se*, and based it upon the fact, that each house received from the other a part of that fund on which the creditors of the other relied for the payment of their demands. This principle has also been decisively affirmed by the Supreme Court in *Winship et al. v. The Bank of the United States*, 5 Pet. 560. Marshall, C. J., said, "partnerships for commercial purposes are necessarily governed by many general principles well known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. . . . Acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restricted, fair dealing requires that the restriction should be made known. Such stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law."

All of these cases show that community of profit constitutes the true criterion whereby to ascertain and determine whether any given agreement for the carrying on of trade or business be or be not really one of partnership; and, as a general rule, whenever it appears that two or more persons have agreed that each shall contribute capital or labor, or both combined, for the purpose of carrying on a trade or business, and that the profits shall be received on joint account, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, whatever may have been their intentions when they entered into the agreement, and even though they

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may have expressly stipulated to the contrary. Sm. Mer. L. (ed. 1856) 44.

It is not necessary, to constitute a partnership, that there should be any property constituting the capital stock which shall be jointly owned by the partners; but the capital may consist in the mere use of property owned by the individual partners separately, and it is sufficient to constitute the relation that they have agreed to share the profits and losses arising from the use of property or skill, either separately or combined. *Champion v. Bostwick*, 18 Wend. 183. Exceptional cases will doubtless occur, in which the general rule as stated will be clearly inapplicable, or where it may need some limitation or qualification to administer justice between the parties. It was to this view of the law that the learned judge referred, in *Cheap et als. v. Cramond*, when he said that the agreement before the court was perfectly distinct from the cases put in the argument, of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed salary, which is only a mode of payment adopted to secure or increase exertion. Special cases also occur where a person may be allowed to receive a part of the profits of a business without becoming a legal or responsible partner. Thus, a party may, by agreement, receive by way of rent a portion of the profits of a farm or tavern without becoming a partner. 3 Kent's Com. (ed. 1858) 33. So, to allow a factor for his commissions a percentage on the amount of sales, instead of a certain sum in proportion to the quantity of goods, does not make him a partner when it appears to be adopted merely as a mode of payment. *Dixon v. Cooper*, 3 Wil. 40. For the same reason, a person in trade or business may employ another as clerk or servant, and agree to pay him a share of the profits, without giving him the rights of a partner; and if he holds no interest in the capital stock, and there are no other circumstances to show any mutuality of interest between them, he will not be held liable even as to third persons, merely because he was compensated in that way. *Burckle v. Eckart*, 1 Den. 342; *Same v. Same*, 3 Comst. 142; *Dwinel v. Stone*, 30 Me. 384. Seamen also may

take a share, by agreement with the shipowner, in the profits or gross proceeds of a whale-fishery or coasting voyage by way of compensation for their services; and the responsibility of partners has never been supposed to flow from such special agreements. *Hazard v. Hazard*, 1 Story, 371; 3 Kent's Com. (ed. 1858) note *a*, 34. All of these citations, and many others of a kindred character, are exceptional cases, resting upon special circumstances which take the matters in controversy out of the operation of the general rule as laid down in the principal case. Attempts have also been made to ingraft other qualifications on the general doctrine, in regard to which there is still considerable diversity of opinion. Applying the exceptional principle, that a contract which merely created a debt without conferring an interest in the profits of a trade or business may not, under special circumstances, constitute a partnership, as in case of a mere factor, agent, or clerk, courts of justice in some jurisdictions have held that the law will never imply a partnership not contemplated by the contracting parties, not even as to third persons, on account of any participation in the profits, unless the stipulation for such participation be of a character to create an interest in the profits, as profits, so as to entitle the party to an account, and to give him a specific lien, or a preference in payment over other creditors. It was so held in effect by Wilde, J., in *Denny et al. v. Cabot et al.*, 6 Met. 92. If, said the learned judge, in delivering the opinion of the court, "the defendant had stipulated for a share in the profits, whether gross or net profits, so as to entitle him to an account, and to give him a specific lien, or a preference in payment over other creditors, and giving him the full benefits of the profits of the business without any corresponding risk in case of loss, justice to the other creditors would seem to require that he should be holden to be liable to third parties as a partner. But where a party is to receive a compensation for his labor in proportion to the profits of the business, without having any specific lien upon such profits to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner even to third persons." Attention is also drawn to several other cases where the same

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limitation is adopted, and which rest upon the same supposed distinction, and it is insisted by the counsel for the defendant that he is not liable within the principles there laid down. On the other hand, many cases are cited by the counsel for the plaintiffs, asserting a broader and somewhat more general scope of liability, and they contend that the defendant is liable whether the principle of the decisions first named be sound or unsound.

Suppose the distinction to exist, and to be well taken, strong doubts are entertained whether it furnishes any better or safer guide for the solution of this class of questions than the one which previously existed in the well-known and long-established rule laid down in the leading case. But having come to the conclusion that the present case runs clear of that distinction, whether well or ill founded, the point will not be further considered at this time.

Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relations between the parties at the time the credit was given, and that liability exists, notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. Secrecy on the part of the dormant partner, and want of knowledge of the circumstances of the case, and of the actual relations of the parties, on the part of the creditor, are therefore essential elements of the liability. Dormant or secret partners are held liable under such circumstances, partly on the ground that every man who has a share of the profits of a trade ought also to bear his share of the loss, and partly on the ground of policy and necessity, to prevent bad faith in secret arrangements; as all experience has shown that, if the rule were otherwise, third persons might be exposed to numberless frauds. In such cases partnership is a conclusion of law arising out of the facts and circumstances of the transaction; and if the creditor has full

knowledge of the circumstances, and of the actual relation of the parties, no such implication will arise. As a general rule, parties are allowed to regulate their own agreements in their own way; and if they are fairly and understandingly made, courts of justice will not interfere to prevent their being carried into effect according to their intentions, unless they contravene some principle of public policy or some positive rule of law. Parties may enter into business arrangements, and participate in the profits, under stipulations that such participation shall not constitute them partners, or render them liable as such; and if their agreements are so framed as clearly to express that intention, the law, as a general rule, will hold them bound by their terms and conditions; and no reason is perceived why any different rule should prevail in respect to third persons dealing with them, who have full knowledge of the stipulations, and of the actual relations which they sustain to each other. To all such creditors there is no dormant or secret partnership or secret arrangement, and to all such there are no circumstances or elements in the case out of which the implication of partnership can arise, and consequently the parties, under such circumstances, as to such creditors, ought not and cannot be held to be partners. Courts of justice have sometimes held that something less than knowledge of the circumstances and of the actual relations of the parties, on the part of the creditor, will be sufficient to defeat a recovery in cases of alleged partnership by implication of law. It is said that it will be sufficient to defeat a recovery in the case supposed, if it appear that the creditor was informed of such facts and circumstances as would induce a man of ordinary care and prudence to suspect that such was their actual relation, or such as would lead a reasonably prudent and cautious man to make inquiry as to the truth of the fact.

Attempts were made, and at one period with very general success, to incorporate that rule into that part of the commercial law which has respect to the rights and obligations of indorsers of bills of exchange and promissory notes, and many courts of justice held that indorsers were not liable to holders for value where it appeared that the latter, at the time of the transfer, had

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knowledge of such facts and circumstances as ought to have excited the suspicions of a prudent and careful man; and, accordingly, the party otherwise liable might set up equities as between himself and the antecedent parties to the paper on the exhibition of that proof. *Gill v. Cubit*, 3 B. & C. 466; 3 Kent's Com. 103 (ed. 1858). Twelve years' experience under the rule was sufficient to satisfy the court which first adopted it that it was unsafe, inexpedient, and impracticable, and in some jurisdictions at least the last remnant of the rule has been shaken off. *Goodman v. Harvey*, 4 Ad. & E. 870; *Goodman v. Simmonds*, 20 How. 343; Chitty on Bills (12th ed.) 257.

All the reasons urged against the rule in its application to bills of exchange and promissory notes appear to apply with equal force against its adoption in cases like the one under consideration. Nothing less than proof that the creditor had knowledge of the circumstances and of the actual relations of the parties can meet the exigency of such a defence; and the question whether he had such knowledge or not, like other disputed questions of *scienter*, must be submitted to the jury under proper instructions from the court. Each partner is the accredited agent of the company, and, as such, has authority to bind the whole within the scope of the partnership business, either by the purchase of goods or the borrowing of money to pay the debts or carry on the business, or for the selling, pledging, mortgaging, or assigning the property and effects on hand. That consequence arises from the fact that when a partnership is formed for a particular purpose it is understood to be in itself a grant of power, at least to the acting members, to transact its business in the usual way. If that business be to buy and sell, then, says Marshall, C. J., the acting member buys and sells for the company, and every person with whom he trades in the way of business has a right to consider, and the law adjudges, that he represents the actual company, whoever may compose it. *Winship et al. v. The Bank of the United States*, 5 Pet. 560; Sm. Mer. L. 73, 74; Parsons' Mer. Law, 174. When the partnership is dissolved, notice published in the journals will be sufficient for the public, but express notice ought to be given to those who have dealt

with the firm, which is generally given by a circular letter. *Godfrey v. Turnbull et al.*, 1 Esp. N. P. R. 371; *Kirwan v. Kirwan*, 2 Crompt. & Mee. 616; *Newsome v. Coles*, 2 Camp. 617. Dormant partners, or those held to be such by mere implication of law, need not give such notice in any way, for the reason which will presently be stated. *Evans v. Drummond*, 4 Esp. N. P. R. 89; *Grosvenor v. Lloyd*, 1 Met. 19. Whether dormant partners, who are held to be such as between the parties, and known to the public as sustaining that relation, can be relieved from responsibility for future debts without giving such notice, need not now be determined. *Evans v. Drummond*, 4 Esp. N. P. R. 90; *M'Ivey et al. v. Humble et als.*, 16 East, 168; *Garter v. Whalley*, 1 B. & Ad. 11. Notice is not required in the case of a partnership implied by law, for the reason that liability to creditors for future contracts ceases when knowledge of the circumstances and actual relations of the parties begins; and as to dealers with the company, who have no knowledge of their relations to the business, the *bona fide* discontinuance of those relations will be sufficient to terminate the implication on which the liability arises. Applying these principles to the facts of this case as they have been agreed by the parties, it is clear that the plaintiffs are entitled to recover. According to the agreed statement of facts, the plaintiffs were guilty of no *laches* in giving the credit, as they never had any knowledge of the circumstances or actual business relations of the defendants until about the time this suit was commenced, and consequently now have the right in contemplation of law, inasmuch as those relations have since been discovered and are now proved or admitted, to regard the defendant, who is defaulted and who purchased the goods and contracted the debt, as having represented the other defendant as well as himself when the purchase was made and the credit given. All of the stipulations which testify their relations were secret, and no one except the defendant, who fails to appear, knew that any one besides himself had any interest either in the store or goods. He transacted all the business, and ostensibly was the sole person interested in the ownership of the goods or in the profits of "the concern," and yet every purchase and sale

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was made under the secret stipulation in writing that the net income or profits, after paying all the expenses of the concern, including rent, lights, fuel, clerk hire, insurance, taxes, and other necessary incidental expenses, should be equally shared between the contracting parties. Goods to the amount at least of two thousand dollars were to be furnished by this defendant, and the other defendant was to furnish the store, and was at liberty to furnish goods to any amount he might see fit; and in case he exercised that privilege, it was expressly stipulated that the profits of the same should be shared in the same way. As a matter of fact, both defendants furnished goods, and the agreed statement shows that the respective amounts were about equal. While it was contemplated that Hovey should ostensibly transact the business and appear to the public as the sole person interested, it was carefully stipulated that the other defendant should have the privilege of selling any goods in the store to his friends and customers, and that the profits of the same, musical instruments only excepted, should go to the concern and be equally shared between them. This defendant also stipulated for an account, and the agreed statement shows that the other defendant, on the 12th of January, 1857, rendered to him a full account of the business, pursuant to the terms and conditions of the written stipulation, and the moiety of the profits belonging to this defendant were included in the note given at the settlement by the other defendant.

On this state of facts not a doubt is entertained that these defendants were partners as to third persons within the principles already explained, and equally so, even if it be admitted that a participation in the profits is not sufficient to constitute that relation, unless it be of a character to entitle the alleged dormant partner to an account, and to give him a specific lien or a preference in payment over other creditors; and accordingly there must be judgment for the plaintiffs against both defendants for the amount specified in the agreed statement, and for their costs.

MASSACHUSETTS DISTRICT.

MAY TERM, 1858.

J. H. CUNNINGHAM *et al.* v. SAMUEL HALL, Appellant.

District Courts have no jurisdiction of a libel *in personam* against the builder, to recover damages for the non-completion of a ship, according to a written contract under which the ship was built and sold, for defects in the construction, discovered after the ship was sold and employed on a voyage.

The jurisdiction of the District Courts is not limited to the particular subjects over which it was exercised in the English courts of admiralty, when the Federal Constitution was adopted; neither does it extend, under the Constitution and laws of Congress, to all cases which would fall within its cognizance, according to the civil law and the practice and usages of Continental Europe.

The intent and meaning of the provision of the Federal Constitution, that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, must be determined in a great measure from the maritime law, as it was known and understood in the jurisprudence of the States when the Constitution was adopted.

Discussion of the extent of the admiralty jurisdiction in the United States.

THIS was an appeal from a decree of the District Court sitting in admiralty. A libel *in personam* was filed by the purchasers and owners of the ship Flying Childers, to recover compensation for damages and expenses of repairs, alleged to have resulted from the non-completion of the ship, by the respondent, according to the terms of a written contract between the parties. When the agreement for purchase and sale was entered into, the ship was in the course of construction, and the respondent contracted to complete her in a particular manner, and when finished to deliver her to the libellants, for a specified sum. Upon the completion of the vessel she was delivered to and accepted by the libellants, who coppered, fitted, and sent her immediately to sea. It was alleged that, soon after sailing, the vessel proved to be leaky, and was subsequently found unseaworthy, in consequence of defects in her planks and calking. After a hearing exclusively upon the merits, the District Court pronounced in favor of the libellants. Between the time of the appeal and the argu-

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ment thereon, the opinion of the Supreme Court in *People's Ferry Co. v. Beers*, 20 How. 402, was announced, and the attention of the circuit judge was only called to the question of jurisdiction.

F. C. Loring, for libellants. The admiralty jurisdiction of the United States courts is not limited to that exercised by the same court in England. *Waring et al. v. Clark*, 5 How. 454; *The Genesee Chief*, 12 How. 443; *Ward v. Peck*, 18 How. 267; *Steamboat New York*, 18 How. 223.

The jurisdiction never depends upon the existence of a lien. If the cause of action be maritime in its nature, it may be enforced by a suit *in personam*, in all cases, and if the maritime or local law gives a lien, *in rem*. *The General Smith*, 4 Whea. 438; *Peyroux v. Howard*, 7 Pet. 341; *Andrews v. Wall*, 3 How. 572; *N. J. S. N. Co. v. Merchants' Bank*, 6 How. 392.

The contract of material men, that is, of those who furnish materials or perform labor, in the building and repairing of ships, is in its nature maritime. *The Hull of a New Ship*, Davies, 199; *Davis v. Child*, Id. 71; *The Sandwich*, 1 Pet. Adm. R. 233; *The Jerusalem*, 2 Gall. 345; *The Nestor*, 1 Sumn. 73; *The Young Mechanic*, 2 Cur. 404; *The Ellen Steward*, 5 McLean, 269.

A material man may sue *in rem*, if he has a lien, and always *in personam* in the jurisdiction where the party is liable to be sued.

C. P. Curtis, Jr., for respondent. No precedents to support the jurisdiction over a suit *in personam*, against the builder of a ship, to recover damages for a breach of warranty, can be found either in this country or in England. All the analogous cases show that such jurisdiction does not exist. *Cutler v. Rae*, 7 How. 729; *Steamboat Orleans*, 11 Pet. 175; *Minturn v. Maynard*, 17 How. 477; *The John Jay*, Id. 399; *Vandewater v. Mills*, 19 How. 83; *Plummer v. Webb*, 4 Mas. 380.

It does not follow that admiralty has jurisdiction over the suit, because the business relates to a ship. *Cox v. Murray*, Abb. Adm. R. 340; *Gurney v. Crockett*, Abb. Adm. R. 490; *Bradley v. Bolles*, Abb. Adm. R. 569; *Andrews v. Essex Ins. Co.*, 3 Mas. 6; *Clinton v. Brig Hannah*, Bee's Adm. R. 419.

A contract to build a ship is a contract made on land, to be performed on land. *Beers v. The Jefferson*, 20 How. 393.

The right to entertain jurisdiction for repairs in a home port depends upon the question, whether a lien is given by the local law. *Read v. New Ship*, 1 Story, 246 ; *Turnbull v. The Enterprise*, Bee's Adm. R. 345.

CLIFFORD, J. Whether the District Court had jurisdiction of the cause as set forth in the libel is now the only point to be decided. Contested questions of long standing yet exist, touching the nature and extent of the admiralty jurisdiction of the District Courts, and in respect to some of those questions there is still a great diversity of opinion, which may be seen even in the reported decisions of the Supreme Court. Some points, however, in this controversy have been authoritatively settled by that tribunal ; and it is believed that a proper application of the principles already established by that court will be sufficient to determine the present question, without entering at large into a consideration of those which remain open to dispute. Assuming the facts to be as they are stated in the libel, it appears that the contract was made in Boston, where all the parties reside and where the service, whether maritime or otherwise, was performed. After the service was performed, an unconditional delivery was made of the vessel, and she was duly accepted by the libellants, who paid the consideration, and thereby became her unquestioned owners. More than seven months elapsed after the vessel was delivered before the libel was filed, and during all that time the libellants had the exclusive possession of the ship, which they still of right retain. Their claim, therefore, if it can be entertained at all in admiralty, can only be enforced by a proceeding *in personam*, such as they have instituted, for the plain reason that a proceeding *in rem*, on their part, would involve an absurdity, as they already have the absolute property in the ship, discharged of all claim on the part of the respondent. Having the absolute property in the ship, they could have no lien to be enforced, and nothing of the kind is pretended by the libellants. They contend that a contract to build a ship is a maritime contract, and that a breach of such a contract, by a failure to complete the ship,

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according to its terms, constitutes a cause of action within the admiralty and maritime jurisdiction of the District Courts ; and that in all cases, where the cause of action is maritime, it may be enforced by a suit *in personam*. That proposition, broad as it is, must be supported to its full extent, in order to uphold the jurisdiction in this case. And the argument proceeds upon the ground, that the mere existence of a lien only affects the remedy in admiralty, and can never give jurisdiction to an admiralty court independently of the character of the contract and the nature of the service performed ; and as an original question, that may be the better opinion, although there are some decisions of the Supreme Court not quite reconcilable with that view of the law. Granting it to be so, then the admiralty can in no case enforce a lien, unless the cause of action be maritime, and one which might be prosecuted by a suit against the person. That question in one of its aspects is now before the Supreme Court, and a decision in the case may be expected during the next term. Regarding the question as an important one, and believing that it does not arise in this case, no opinion will be expressed on the subject. A single question is presented in the argument, and it is the only one which will be decided ; and that is, whether the purchaser of a ship, constructed for him, under a written contract, after he has paid the consideration and accepted the ship, and fitted her as a sea-going vessel, may maintain in the District Court a suit *in personam* for damages against the builder for the non-completion of the ship, according to the contract, on account of defects in the construction, which were discovered subsequent to her delivery and employment on a foreign voyage. Ship-building is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land as much as any other mechanical pursuit, and men engage in the business for a livelihood just as they do in other mechanical employments and for the same purpose. Shipwrights are seldom ship-owners, and not more frequently interested in commerce and navigation than other mechanics ; unlike the seaman, their home is on land and not on the seas. Ships are bought and sold in the market, after they are constructed or partly constructed,

and before they are fitted as sea-going vessels, just as ship-timber, engines, anchors, or chronometers are bought and sold ; and no reason is perceived why a contract to build a ship, when there is no lien to be enforced, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage a ship, should be regarded as maritime. Such contracts are made on land and are usually performed on land, and when they are based upon the personal responsibility of the parties, as they are when there is no lien, their remedy is most conveniently and appropriately sought in the courts of the common law. No distinction in principle is perceived between a contract to build a ship, as in this case, and a contract for the materials, as the latter are included in the former, and both fall within the same principle under the rules of the civil law. These propositions lead necessarily to the conclusion, that contracts for ship-building, and contracts for repairs and supplies, in the home port, must stand upon the same footing, in respect to the question of jurisdiction, and be governed by the same principles. Whether the admiralty has or has not jurisdiction to enforce a lien created by the local law, it is not necessary now to decide, as no such question arises in the case. Every one who had repaired or fitted out a ship, whether at home or abroad, or lent money to be employed in those services, had by the civil law a privilege or right of payment, in preference to other creditors, upon the ship itself, without any instrument of hypothecation, or any express contract or agreement, subjecting the ship to such a claim ; and that privilege still exists, in those countries which have adopted the civil law as the basis of their jurisprudence. That rule was never adopted in England, in respect to repairs and supplies in the home port, and is not included in the recent act of Parliament, passed in the present reign. According to the law of that country, a shipwright, who had taken a ship into his own possession to repair it, was not bound to part with the possession until he was paid for the repairs, any more than any other artificer, unless there was a special agreement to give credit for a definite period ; but a shipwright who had once parted with the possession of the ship, or

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had worked upon it without taking possession, or a tradesman, who had furnished materials or supplies for a ship, was not preferred to other creditors, and had no particular claim or lien upon the ship itself, for the recovery of his demand. Work, therefore, done for a ship in England, was supposed to be on the personal credit of the employer. *Wilkins v. Carmichael*, 1 Doug. 101; Abb. on Ship. (5th Am. ed.) 187. But it is now settled by statute in that country, that the Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever, for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of the county or upon the high seas at the time when such necessities were furnished in respect of which such claim is made.

Admiralty courts in England, for a long time, held that repairs and supplies created a lien upon the ship, until the doctrine was finally overthrown by the common-law courts, in the reign of Charles the Second, and this statute was passed to restore the jurisdiction in respect to such claims, when the services were rendered for foreign vessels. More consistency has been preserved by the courts of this country. Here a lien is admitted, as arising from the necessity of the case, for such repairs and supplies as are reasonably fit and proper while the ship is abroad or in a port of a state to which she does not belong. When the ship is in a port of a state other than the one to which she belongs, the master, in the absence of the owners or employers of the ship, becomes their general agent by virtue of his appointment for providing necessary repairs and supplies for the preservation of the ship and the prosecution of the voyage; and such contracts are maritime and create a lien on the ship, which may be enforced in admiralty by a suit *in rem*. *Thomas v. Osborn*, 19 How. 22; *The Aurora*, 1 Whea. 102. No such rule has ever prevailed in this country, in respect to repairs and supplies in the home port, except it be in favor of the shipwright who has repaired the vessel and has not parted with the possession. In that case it is undeniable that he is entitled to retain the vessel until he is paid for his services. A somewhat broader doctrine

was formerly maintained in some of the District Courts, denying that any distinction existed between foreign and domestic ships, and holding that material-men had a lien on the ship for repairs done in domestic as well as in foreign ports, and might sue therefor in the admiralty.

This was held by Judge Winchester, in the case of *The Sandwich*, 1 Pet. Adm. R. 233 ; and a like opinion was intimated by Judge Peters, in *Gardiner v. The Ship New Jersey*, 1 Pet. Adm. R. 223 ; though the learned judge admitted that his own practice had been to refer parties exhibiting such claims to the State jurisdictions. Other District Courts fully admitted the distinction, and it was applied by them in practice in determining the question of jurisdiction. *Clinton v. The Brig Hannah*, Bee's Adm. R. 419 ; *Shrewsbury v. The Sloop Two Friends*, Bee's Adm. R. 433 ; *Boreal v. Ship Golden Rose*, Bee's Adm. R. 131 ; *Prichard v. Schooner Horatio*, Bee's Adm. R. 167. Such was the state of the decisions in this country, when the case of the *General Smith*, 4 Whea. 438, was carried to the Supreme Court ; and it was there held, that where repairs have been made, or necessities furnished, to a foreign ship or to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security ; but that repairs and necessities furnished in the port of a state to which the ship belongs were governed altogether by the municipal law of that state, and that no lien in such a case was implied by the maritime law ; and accordingly the court denied the lien in that case, because the law of the state where the repairs were made did not give it for repairs on a domestic ship. Where the repairs are made or the supplies furnished for a vessel in a port of a state to which the vessel does not belong, she is considered a foreign vessel, and the rule of the general maritime law prevails ; and for the plain reason that repairs and supplies in a foreign port are no less essential than the services of the mariner to furnish "wings and legs" to the ship, for the purpose of enabling her to complete the voyage for the benefit of all concerned. Necessity constitutes the foundation of the maritime lien for repairs and supplies, and that is made evident from the considera-

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tion, that if the owners are present, no lien is implied. On the other hand, where the vessel, through stress of weather or other accident, puts into a foreign port, and repairs or supplies are required, either for the safety of the ship or the prosecution of the voyage, the master, in the absence of the owners, has the right *ex necessitate* to procure them on the security of the vessel; and it is that necessity which confers the right to create the lien, and consequently where no such necessity exists, no such right can be exercised by the master; and it is because it does not exist in respect to repairs and supplies in the home port that no maritime lien is implied. And accordingly it was held by the Supreme Court, in *The Ferry Co. v. Beers et al.*, 20 How. 402, that where the owner is present, no lien is acquired by the material-man, nor is any lien acquired where the vessel is supplied or repaired in the home port; and it was said that the lien attaches to foreign ships and vessels only in favor of the carpenter, who repairs in a case of necessity and in the absence of the owner. *Pratt et al. v. Reed*, 19 How. 359.

Such jurisdiction in cases of contract depends principally upon the nature of the engagement, and is limited to such as are purely maritime and have respect to rights and duties appertaining to commerce and navigation. 3 Story's Com. on Con. 528. A contract to build a ship has much less reference to a voyage than a contract for repairs and supplies in the home port, and furnishes much less reason to imply a maritime lien. Judge Story admitted, in *Andrews v. Essex Ins. Co.*, 3 Mas. 16, that such a contract could not be enforced in admiralty; and it was expressly held in *Clinton v. Brig Hannah*, Bee's Adm. R. 419, decided in 1781, that a shipwright could not sue in the admiralty for his contract wages for building a ship, and that case was cited and approved in the recent opinion of the Supreme Court, *The Ferry Co. v. Beers et al.*, where it is emphatically declared, that "at no time since this has been an independent nation has any such practice been allowed." No case is cited in the argument, like the one under consideration, where jurisdiction has been entertained in the admiralty, and it is believed none can be from the decisions in this country which are recog-

nized as authority at the present day. Such contracts are regarded as contracts made on land, and to be performed on land, as much as contracts for steam-engines, anchors, or chronometers; and as the circumstances attending these engagements usually afford the parties the amplest opportunity to know each other's pecuniary standing, they are supposed to be based upon personal responsibility, and consequently create no maritime lien upon the ship.

By the second section of the third article of the Constitution, it is declared that the judicial power shall extend to all "cases of admiralty and maritime jurisdiction"; and it was doubtless the intention of Congress, by the ninth section of the Judiciary Act, to confer the exclusive original cognizance of all causes of "admiralty and maritime jurisdiction" upon the District Court; and the words of the act are to that effect, being "in terms exactly coextensive with the power conferred by the Constitution." In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On this subject two propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without any particular discussion of the principles on which the decisions rest: —

First, it is well settled that the jurisdiction of the District Courts is not limited to the particular subjects over which the English Courts of Admiralty exercised jurisdiction when the Federal Constitution was adopted.

Secondly, that the jurisdiction in admiralty, under the Constitution and laws of Congress, does not extend to all cases which would fall within it according to the civil law and the practice and usages of Continental Europe.

Both these propositions are so firmly established, or so necessarily result from the decisions of the Supreme Court, that further discussion upon the subject appears to be unnecessary. 1 Kent's Com. (9th ed.) 402 – 419. Abb. on Ship. (5th Am. ed.) 180 – 192. All the powers of the government of the United States, under the Federal Constitution, were derived from the people of the States who framed the Constitution and put the government

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itself into operation. Maritime laws, and appropriate tribunals to administer them, existed in the States at the time the Federal Union was formed. Those tribunals had their origin in Colonial times, long before the Confederation, and were continued until the Constitution was adopted and the judicial system of the United States was organized. When the Colonists immigrated here, they brought with them the laws of the parent country as their birthright, and, so far as they were applicable to their local condition, they were adopted and reduced to practice. After their organization as Colonies, they assumed and exercised all the powers of government. New laws were made, and those in operation were modified. Judicatories were created and empowered to hear and determine causes, as well those of a maritime character as all other civil and criminal cases; and when, in the progress of time, they found it necessary and proper to frame the Federal Constitution, and saw fit to provide that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, it was to the admiralty jurisdiction as it was well known and understood in the jurisprudence of the States that the framers of the Constitution referred. That jurisprudence in all its branches was largely borrowed from the parent country, and was administered in tribunals fashioned after models drawn from the same source. These facts cannot be successfully controverted, as they are written on every page of the history of those times. That the admiralty jurisprudence of the States embraced some subjects not at the time admitted to be within it, according to some of the decisions of the King's Bench, there can be no doubt, and hence is the correctness of the proposition, that the jurisdiction of the District Courts is not limited to such subjects only as were allowed by those decisions to be of a maritime character.

Jurisdiction in admiralty under the Constitution of the United States and laws of Congress must be, therefore, determined by a just reference to the laws of the States and the usages of the courts prevailing in the States at the time when the Constitution was adopted. No other rules are known, which it is reasonable to suppose could have been in the minds of the men who framed the Constitution and organized the judicial system of the United

States, than those which were then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts. Many of the laws and usages were the same as those then acknowledged in England, and to that extent the admiralty decisions in the State courts and those made in the courts of the parent country and of the commercial countries of Continental Europe, when analogous, furnish a common guide. *Warring et al. v. Clark*, 5 How. 454; *Shrewsbury v. The Sloop Two Friends*, Bee's Adm. R. 433; *Ferry Co. v. Beers et al.*, 20 How. 393; *Grant et al. v. Poillon et al.*, 20 How. 162.

Apply these principles to the present case, and there can be but one conclusion. Suits *in personam* for the non-completion of contracts for building a ship on land, and in a locality where all the parties reside, were never entertained in the admiralty before the Constitution was adopted; and so far as appears, no such practice has been allowed since that time. Absence of all authority in adjudged cases after so long a period, and in a country so highly commercial as that of the United States, furnishes strong reason to conclude that the jurisdiction does not exist. Contracts for the building of ships, where a lien is given under the local law, have heretofore been regarded as maritime, and in repeated instances the lien so created has been enforced by a proceeding *in rem*, and the practice appears to be fully sanctioned by the twelfth admiralty rule.¹ *The Calisto*, Daveis, 30; *Read v. The Hull of a New Brig*, 1 Story, 344; *Davis et al. v. A New Brig*, Gil. 473. Those cases are clearly distinguishable from the one under consideration, and cannot affect the question now to be decided. Here there is no lien to be enforced, and the suit is one against the person and for damages for the non-completion of the contract. Such suits, it is believed, are unknown in the admiralty practice of the country, and analogous cases support the proposition that the jurisdiction cannot be sustained. Admiralty jurisdiction is conferred by the Constitution, and cannot be enlarged or diminished; and in this point

¹ The twelfth admiralty rule then in force is now repealed.

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of view, the decisions of the courts of this country upon jurisdictional questions, and the analogies to be drawn from them, are the safer guide, as, after all, such questions must be determined in a great measure by the maritime law of the United States, as it was known and understood in the courts of the States which formed the Union at the time the Constitution was adopted. Other analogous cases may be referred to, tending to show that the jurisdiction in this case cannot be sustained. When a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore, it was held by Judge Betts, that this was not a maritime contract cognizable in an admiralty court; and again, where a master, so employed, abandoned a sale of the cargo in order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo, it was also held, that this was a breach of contract, for which no action would lie in a court of admiralty. *Waterberry v. Myrick*, Bl. & How. 34; *The Ship Harriet*, Olcott, 229. Judge Betts also held in *Cox v. Murray*, that a court of admiralty has no jurisdiction to afford a remedy, either *in rem* or *in personam*, for the breach of an executory contract for personal services to be rendered to a vessel in port, in lading or unlading her cargo. And the same learned judge remarked, that if such suits can be maintained, "the master or owner might resort to the same tribunal for the violation of agreements to build or repair a vessel, to supply her with stores, or to provide her with a stipulated cargo." And he declared, that "the strong current of authority runs against the existence of any such powers in admiralty courts. *Cox v. Murray*, Abb. Adm. R. 340; *Gurney v. Crockett*, Abb. Adm. R. 490; *Bradley v. Bolles*, Abb. Adm. R. 569; *Ransom v. Mayo*, 16 Law Rep. 397. Wherever jurisdiction of contracts between parties residing in the same State, for work and materials in the building of a ship, has been entertained, the proceeding has been *in rem*, and the supposed right of jurisdiction has been regarded as depending upon the question, "whether a lien is given by the local law of the State." Jurisdiction was placed expressly on that ground in *Reed v. The Hull of*

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a *New Brig*, 1 Story, 246, where it was admitted that "the right to maintain jurisdiction depends upon the fact, whether there is a lien *when the suit is commenced*." Similar views are held also by Judge Conkling, in *Merritt et al. v. Sackett*, 12 Law Rep. 515, where he says, that it is only in virtue of the lien given by a State law, that the admiralty jurisdiction is held to attach at all; and if the question had not actually been determined, it might be worth while to consider whether it would not be better to leave such liens to be enforced by the State tribunals alone. The suit in that case was *in personam*, and, there being no lien under the local law, it was held that the District Court had no jurisdiction. And Justice Johnson, in *Ramsay v. Alligre*, 12 Whea. 614, held the same doctrine, in an elaborate opinion, where the whole subject is very fully considered.

For these reasons, I am of the opinion that the District Courts have no jurisdiction of a libel *in personam* against the builder, to recover damages for the non-completion of a ship, according to the written contract under which the ship was built and sold, for defects discovered in the construction after the ship was delivered and employed on a voyage. Remedies for the breach of such contracts, under such circumstances, appropriately belong to the courts of the common law.

The decree of the District Court is therefore reversed, and the libel dismissed for want of jurisdiction.

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PARROTT *et al.*

Where in a charter-party it was covenanted that the charterers should furnish the vessel at Calcutta with a full cargo, and, among other articles of freight, "sufficient saltpetre or its equivalent for ballast," held, that ballast paying freight was the object of the latter proviso, and that, in order to constitute a compliance with the charter-party, the goods must be of the description of *heavy goods* usually purchased for exportation at Calcutta; should be suitable and proper for ballasting the ship named in the contract, having reference to the intended voyage and stipulated cargo.

Words are to be construed according to their primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to

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be used in a different sense, or unless in their primary signification they are incapable of being carried into effect; in which latter case, the first rule is the intention of the parties, to be collected from the words of the instrument and its subject-matter.

Whether a suit claiming damages for the non-fulfilment of a charter-party, on account of a refusal to furnish a specified cargo, can be sustained in admiralty, or whether the party must resort to his personal action for damages as in other cases, *quære*.

APPEAL in admiralty from a decree of the District Court. In September, 1858, the libellant let to freight the ship *Martha* to the respondents, for a voyage from Boston to Calcutta and back; and the respondents, as charterers, engaged to provide the vessel at Calcutta with a full cargo for Boston. The cargo was to consist of such goods as would load the vessel full, and to a fair and reasonable draft, with the stipulation that the article of linseed was not to exceed one half the cargo, and with a further proviso that sufficient saltpetre or its equivalent should be furnished for ballast, and as much loose stowage as the master of the vessel should require. Loose stowage was to consist of pockets of linseed, ginger, bundles of twine, or loose gunny-bags, each or either, at the option of the agent of the respondents at Calcutta. Fifteen dollars per ton was to be paid for whole packages, and seven dollars and fifty cents for broken stowage; libellant to victual and man the ship, and furnish suitable dunnage for the cargo. Forty running lay days were to be allowed at Calcutta from the time the ship was ready to receive cargo. When the ship arrived at Calcutta, the British government had prohibited the exportation of saltpetre in American vessels, and consequently none was furnished. Other goods, however, were supplied, and linseed comprised less than half the cargo; and the ship was loaded, and brought eleven hundred and eighty-three tons safely home. She also brought stone ballast amounting to ninety-two tons.

As damage for the non-fulfilment of the charter-party, the libellant, as owner, claimed a sum equal to the amount the ship would have earned in freight if saltpetre or its equivalent had been furnished to supply the place of the stone ballast. No claim for freight on any of the goods brought home was made, and saltpetre could not have been shipped at Calcutta without a forfeiture of both the vessel and the goods.

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A libel *in personam* was filed in the District Court, claiming damages to the amount of two thousand dollars, and setting forth as the cause of action the non-fulfilment of the charter-party, by the refusal of the agent of the respondents at Calcutta to furnish sufficient saltpetre or its equivalent for ballast.

The claim was urged upon the ground that the failure to furnish such heavy goods as freight made it necessary that the master should retain and bring home the stone ballast, and thus diminished to that extent the capacity of the ship to receive goods and earn freight on the voyage. To this it was in effect replied, that the stone ballast was unnecessary, because the cargo which was supplied and brought home contained in itself a sufficient quantity and proportion of heavy goods, if they had been properly stowed, to have served for ballast for the ship.

In the District Court the defence was sustained, and the libel dismissed.

R. H. Dana, Jr., and *S. C. Guild*, for libellant.

C. P. Curtis, Jr., for respondents.

CLIFFORD, J. Subject to certain limitations, which will presently be stated, the libellant was bound to receive as freight such goods as the agent of the respondents should offer. These limitations were, that the goods should be such as, in the language of the charter-party, would fill the vessel full, and load her to a fair and reasonable draft; that sufficient saltpetre or its equivalent should be furnished for ballast, and that linseed should not exceed one half the cargo. "Saltpetre or its equivalent" are the words of the charter-party, and it becomes important to ascertain in what sense the word "equivalent" was used by the parties. Words are to be construed according to their primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their primary signification they are incapable of being carried into effect. What is meant by an equivalent for ballast is nowhere defined in the charter-party; and yet, according to its plain terms, it was at the option of the respondents to furnish sufficient saltpetre or its equivalent for ballast, leaving it to be otherwise ascertained what goods or

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merchandise constituted such an equivalent for that purpose. Any article of goods or merchandise, such as is usually shipped from that port, paying equal freight, and having equal weight for ballast, may be said to be an equivalent for saltpetre within the strict primary sense of the words employed in the charter-party ; and it would be difficult to say that any approximation to equality in those respects short of that standard would fulfil their strict primary meaning. That construction cannot be admitted, as upon that view of the charter-party compliance would have been impossible. Articles of the same value and weight as saltpetre cannot in general be obtained for those purposes at Calcutta, if, indeed, they may elsewhere, and heavier goods are seldom to be purchased in that market, and then only in small quantities. When it was ascertained that saltpetre was prohibited, the master of the ship, who was the agent of the owner, made request for rice and sugar to supply its place ; and it seems to be admitted, that if those articles, or either of them, had been furnished, it would have constituted a compliance with the contract ; although the case shows, what is known to be the fact, that those articles respectively are lighter than saltpetre. A case is therefore presented in which it becomes necessary to resort to construction, not only because the words employed are indefinite and undefined, but for the additional reason, that upon their strict primary signification the contract itself could not be carried into effect. In such a case the primary rule is the intention of the parties, which must be collected from the words of the instrument and the subject-matter to which it relates. An exact equivalent cannot usually, if ever, be obtained in that market ; and therefore it would be unreasonable to suppose that such requirement was within the contemplation of either party. Ballast paying freight was the object of the stipulation ; and, in order to constitute a compliance with the charter-party, the goods must be of the description of heavy goods usually purchased for exportation in Calcutta, and suitable and proper for ballasting the ship named in the contract, having reference to the stipulated cargo and voyage. Under the charter-party it was at the option of the respondents to furnish as cargo such goods as they

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pleased, subject in this behalf to the limitation, that a proportion sufficient to ballast the ship should be heavy goods suitable and proper for that purpose; so that the whole question turns upon the issuable fact, whether or not the cargo furnished, or offered to be furnished, contained in itself sufficient heavy goods suitable and proper for ballasting the ship during her homeward voyage. At common law the matter in dispute would be a question of fact for the jury, and in the admiralty it must be determined by the court from the evidence. Both parties have introduced evidence upon this point, and it is conflicting. Strong doubt is entertained whether the evidence justifies the conclusion that the cargo as stowed and shipped did furnish such weight for ballast as would have authorized the master to dispense altogether with the stone ballast used and brought home. Many of the witnesses are of the opinion that less would have answered every valuable purpose; and it clearly appears, from the testimony on both sides, that a considerable quantity of the heavy goods were placed between decks, and that some of the light goods were stowed in the lower hold. After having determined to retain a portion of the stone as ballast during the return voyage, that manner of stowing the goods might be allowable; but, on the hypothesis assumed in the charter-party, that the cargo should serve as ballast, it showed great want of good judgment, for which the respondents are not responsible, as the master was the agent of the owner; and as such it was his duty, not the respondents', to know the construction and capacity of the ship, and the proportion of heavy or light goods wanted, and where and in what manner they ought to be stowed to carry into effect the intention of the parties. Heavy goods, such as linseed, hides, indigo, and castor-oil, were furnished, shipped, and brought home; and the parties agree that the agent of the respondents was ready to furnish as much linseed as should be required of him by the master, not exceeding one half the cargo. Readiness to furnish, and an offer to that effect, under the circumstances of this case, are equivalent to furnishing, so far as the present question is concerned; as it was incumbent upon the master, as the agent of the owner, to make known to the re-

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spondents or their agent in Calcutta what proportions and quantities of the several articles furnished would be necessary to load and ballast the ship; and if he omitted to make requisition, and unnecessarily retained the stone ballast when the goods offered were suitable and proper to supply its place, the consequences of such neglect must fall upon his principal, and not upon the shipper. Such were the views of the district judge, and they appear to be correct. On this point the weight of the evidence is clearly on the side of the respondents, and it is decisive of the cause upon its merits. Five witnesses called by the respondents testify that the cargo shipped, if it had been properly stowed by placing the heavy goods at the bottom, would have sufficiently ballasted the ship without the stone. These witnesses have had much experience in the Calcutta trade, either as merchants or shipmasters, and are also well acquainted with the ship. Opposing testimony was introduced by the libellant, coming, however, to some extent, from persons whose means of knowledge, either respecting the ship or the trade in which she was employed, are far less satisfactory. Others based the opinion that stone ballast was necessary with that cargo too exclusively upon the ground that the build of the ship made her crank; and several appear to assume, what is contrary to the theory of the charter-party, that there is no article of merchandise among the goods usually exported from Calcutta, which is suitable and proper as a substitute for stone ballast in a loaded ship of that description, except saltpetre, or perhaps sugar. Some ships are crank when unloaded, and stiff when filled with cargo; and the testimony introduced tends strongly to show that such was the character of the ship in question. "Sufficient saltpetre or its equivalent," for ballast, are the words of the contract, and not a doubt is entertained from the evidence that a cargo made up of the articles shipped in this case, arranged within the restrictions of the charter-party, in suitable proportions of heavy goods to light, if properly stowed by placing the heavy goods at the bottom, would afford sufficient and convenient ballast for a ship of that description, and save all necessity of the stone for that purpose. Additional linseed was offered, and if the proportion of heavy

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goods already furnished had been insufficient, it should have been accepted to the extent that was allowable under the charter-party, which would have been ample and more than ample for the purpose; and if the master had been of the opinion that the whole amount so allowable would not be sufficient, a proportion of the stone equal to the space usually occupied by dunnage might well have been retained without any departure either from the spirit or letter of the charter-party. Whether the stone retained filled more or less space than is usually occupied for dunnage it is not necessary to determine, as it is clear that if it did it was the fault of the master, who admitted in his testimony that he removed a portion of it because it occupied space in which he could put goods; and it is satisfactorily shown, that the residue, or so much of it as occupied any such space, might have been safely removed if the cargo had been properly stowed, and he had performed his duty in making proper requisition upon the agent of the respondents, or had accepted the additional linseed when it was offered. These views lead necessarily to the conclusion that the libellant is not entitled to recover, and render any further consideration of the other points of the defence unnecessary.

A question of jurisdiction, however, arises in this case, which perhaps ought not to be passed over without remark. Contracts of affreightment, where the goods are actually shipped, are undoubtedly within the jurisdiction of the admiralty. They constitute a lien upon the ship, which may be enforced either *in rem* or *in personam*. No claim is made in the case for any amount of freight earned, or for any deterioration of the goods shipped. All that part of the claim, it may be presumed, was settled and adjusted between the parties when the ship returned, as no such claim is set forth in the libel. More doubt is entertained whether a suit, claiming damage for the non-fulfilment of a charter-party on account of a refusal to furnish a stipulated cargo, can be sustained in the admiralty under the recent decisions of the Supreme Court. It was expressly determined in *Freeman v. Buckingham et al.*, 18 How. 168, that, under the maritime law of the United States, the vessel is bound to the cargo and the cargo to the ves-

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sel for the performance of a contract of affreightment, and that the law creates no lien on the vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made and the cargo shipped under it. In *Vandewater v. Mills*, 19 How. 90, the Supreme Court deny that any treatise on maritime law has authorized the conclusion, that every contract by the owner or master of a vessel for the future employment of it hypothecates the vessel for its performance, and say, in effect, that the lien or privilege is founded on the rule of the maritime law, and stands upon the doctrine that the obligation is mutual and reciprocal, and in such cases that the merchandise is bound to the vessel for freight and charges, and the vessel to the cargo. But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery of goods never received on board. Consequently if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo, and depart on her voyage according to the contract, the charterer has no privilege or maritime lien on the ship for such breach of contract by the owners, but must resort to his personal action for damages as in other cases. See *Cox v. Murray*, Abb. Adm. R. 342. Whether this case might or might not be distinguished from the principle there laid down, it is not necessary now to determine. No question of jurisdiction was made at the argument, and therefore the point will not be decided at the present time, as the judgment, in any event, must be for the respondents. The decree of the District Court is therefore affirmed with costs.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1858.

JULIUS A. PALMER *et als.* v. WILLIAM H. ELLIOT AND STANFORD HOVEY.

Where two persons by virtue of a private agreement, became partners as to third parties, the contract specifying no firm name, but allowing each partner to purchase goods on his own individual credit, and designating one of the two to transact the business, while the connection of the other was kept secret, *held*,

That the dormant partner was not liable, on a note, for goods put into the concern by the one who conducted the business, and signed with his name, where the signature was not intended as that of the firm, and the payee was ignorant of the relation of the parties.

In Massachusetts, when a debtor gives his own negotiable bill or note for a pre-existing debt, it is *prima facie* evidence of payment.

But this presumption may be rebutted by circumstances showing that such was not the intention of the parties, — or if the paper accepted is not binding upon all the parties previously liable, — or where there is fraud, concealment, misapprehension and great unfairness in giving the security.

Under such circumstances the holder is at liberty to surrender the note to the party who gave it, or place it on the files of the court for that purpose, and will then be entitled to recover on the original contract.

THIS was an action of assumpsit, and was submitted upon an agreed statement of facts. With the exception of one or two particulars the material circumstances were the same as in the case of *Bigelow et al. v. Elliot et al.*, *ante*, p. 28. The points of difference were these: the declaration in this case contained three counts, two of which were the same as those in the case above mentioned, namely, one being for goods sold and delivered, and the other upon an account annexed, which embraced six charges. Of these, the first and third were included in the note declared on in the third count. The note was given by the last-named defendant, and bore his signature alone. All the goods were purchased by him, and the plaintiffs gave to him exclusively the credit for the amount included in the note, they having no knowledge of the other defendant's interest in the store or the goods, or of the existence of any private agreement between the two

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defendants. Moreover, the last-named defendant purchased the goods and gave the note without consultation with his associate, and without his knowledge. As in the other case, the second defendant, Hovey, the maker of the note, was defaulted, and Elliot pleaded the general issue.

It was contended that the defendants were not partners, but the court held this point to be decided by the case above referred to, and held that the plaintiffs were entitled to recover so much of the amount claimed as was not included in the note set forth in the third count.

Clark and Smith, for plaintiffs.

Morrison and Stanley, for defendants.

CLIFFORD, J. On the present state of facts it is impossible to say that Hovey, in signing the note, used the name affixed to it as a partnership name. He professed to act for himself, and pledged his own credit; and it clearly appears, from all the circumstances disclosed in the agreed statement of facts, that he signed the note, using the name affixed to it as his own personal designation, and it was so understood by the plaintiffs at the time the goods were sold and the note given. Two or more persons carrying on a trade or business may adopt the name of one of their number as a partnership name, or they may even adopt a fictitious name, and the use of such name by one of the company in transacting the proper partnership business will bind the firm. When the firm name is the same as that of one of the individuals composing the firm, a material distinction arises, which it becomes important to notice, especially if that individual member of the firm is also separately engaged in a similar pursuit. In such cases the mere proof of the signature to a bill or note, unaccompanied by any circumstances tending to show that the name affixed to it was used and signed as the firm name, is not in general sufficient to entitle the plaintiff to recover against the firm, and some courts and text-writers have held that it is not even *prima facie* evidence that it was a transaction appertaining to the partnership business. Parsons's Mer. Law, 177; *Manufacturers & Mechanics' Bank v. Winship et al.*, 5 Pick. 11; *U. S. Bank v. Binney*, 5 Mas. 176; *Miner v. Downer*, 19 Vt. 14. Other cases

assert the doctrine that when it does not appear that the individual whose name is used has been engaged in business on his private account, and it appears that the name is the firm name, it will be presumed that it was used for the firm. *Trueman v. Loder*, 11 Ad. & E. 589; *Bank of Rochester v. Monteath*, 1 Den. 402; *Bank of S. C. v. Case*, 8 B. & C. 427; *Palmer v. Stephen*, 1 Den. 479; *Miller et als. v. Manice*, 6 Hill, 114. Applying these principles to the facts of this case, it is quite certain that the plaintiffs cannot recover upon the third count, as the agreed statement clearly shows that the defendant who signed the note used the name, not as a partnership name, but as the one properly describing himself; and, as both parties so understood it, the law cannot give any other character to the transaction. Moreover, these defendants had not adopted any firm name whatever, and, what is more, it was expressly agreed between them that each should purchase goods in his own name and on his own separate individual credit, and it does not appear that either had ever departed from the course which both alike had contracted to pursue. Another consideration presented is, whether the plaintiffs may not recover the whole amount claimed under the general counts. Both of the items of charge included in the note are sued for in those counts. Whether they can so recover or not, depends upon the question whether the note in suit was received by the plaintiffs in payment of that part of the account for which it was given. At common law a promissory note, given for a simple contract debt, does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was given, and that is the rule which prevails in most of the States composing our Union. But this contract was made in the Commonwealth of Massachusetts, and the courts of that State have adopted a different rule. It is there held that, when a debtor gives his own negotiable bill or note for a pre-existing debt, it is *prima facie* evidence of payment; and the reason assigned for the rule is, that otherwise the debtor might be obliged to pay the debt twice. *Maneely v. McGee*, 6 Mass. 143; *Thacher v. Dinsmore*, 5 Mass.

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299. Her courts also hold that if such bill or note is given for a part of the debt, it is deemed payment of such part, even though the debt is collaterally secured by a mortgage. *Ilisley v. Jewett*, 2 Met. 168; *Fowler v. Bush*, 21 Pick. 230; 2 Greenl. Ev. § 520. Some exceptions and qualifications have been admitted to this rule in the jurisdictions where it prevails, which it becomes important to notice in this investigation. All the cases allow that the reception of the bill or note is nothing more than *prima facie* evidence that it was received in payment, and they generally admit that such *prima facie* presumption may be rebutted and controlled by any circumstances which show that such was not the intention of the parties. It was so held in *Watkins v. Hill*, 8 Pick. 522; and such appears to be the settled doctrine in all the jurisdictions whose courts of justice have departed from the common-law rule upon the subject. *Butts v. Dean*, 2 Met. 76; *Reed v. Upton*, 10 Pick. 522; *Jones v. Kennedy*, 11 Pick. 125; *Comstock v. Smith et al.*, 23 Me. 202; *Gilmore v. Buzzey*, 12 Me. 418. Some courts have gone further, and held that the presumption of payment may be controlled, not only by the agreement of the parties, but by proof of a contrary usage, or by any circumstances inconsistent with the presumption. *Varner v. Nobleboro*, 2 Me. 221; *Descadilas v. Harris*, 8 Me. 298. In the course of the numerous decisions which have grown out of the departure from the common-law rule, certain exceptions or qualifications to the rule have been recognized and established by the courts in jurisdictions where the opposite rule prevails, to which it may be useful to advert on the present occasion, so far as they have an immediate bearing upon the question under consideration. One of those exceptions is, that if the negotiable paper, whether bill or note, was accepted in ignorance of the facts, or under any misapprehension of the rights of the parties, the rule that it shall be held *prima facie* to have been received in payment of the pre-existing debt does not apply. *French v. Price*, 24 Pick. 13. So, if the paper accepted is not binding upon all the parties previously liable, it is held that the presumption of payment may be considered as repelled. *Melledge v. The Boston Iron Co.*, 5 Cush. 158; *Fowler v. Ludwig*, 34 Me. 461.

Reference to one other of these exceptions will be sufficient at the present time. All the well-considered cases agree that, if the transaction is tainted with fraud, or if it appears that there was any concealment, misapprehension, or unfairness, in giving or passing the new security, proof of such facts, or any one of them, will be sufficient to repel the presumption, and to entitle the creditor to recover upon the original contract. Assuming the law to be as stated, of which there can be no doubt, it is obvious what the result must be in this case. Both of the defendants, in contemplation of law, were originally liable for the charges in the account which were included in the note described in the writ; and the note itself, as there described, furnishes plenary evidence that it was only executed and signed by the defendant, who is defaulted. And if so, it proves to a demonstration that all the parties originally liable are not bound by the new security; and, what is equally decisive of the question, the agreed statement shows that the plaintiffs, in accepting the note, acted in utter ignorance of their rights in the premises, and without any knowledge whatever of the actual relations which existed between these defendants. Without more, these two facts are sufficient to repel the presumption that the note was received in payment of that part of the account for which it was given. But it also appears that it was given under circumstances of concealment and great unfairness on the part of the defendant who gave it, if not of actual fraud, and therefore falls within the exception admitted by all the well-considered cases upon the subject. Under the circumstances, the plaintiffs are at liberty to surrender the note to the party who gave it, or to place it on the files of the court for that purpose, and then they will be entitled to judgment for the amount specified in the agreed statement, excluding the note, and for the amount of the charges for which the note was given, with interest on the same from the date of the writ, and for their costs.

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MASSACHUSETTS DISTRICT.

MAY TERM, 1858.

PAUL SEARS *et als.*, Libellants and Appellants, v. 4,885 BAGS OF
LINSEED, &C.

Where a portion of a cargo was delivered to the consignee, to be reshipped, and was accordingly shipped to another port, and the residue delivered to him without qualification, under the circumstances of this case, *held*, that the ship-owners' lien upon the part last delivered was displaced, notwithstanding a clause in the charter-party that "freight should be paid, one half in five, balance in ten days after discharge in Boston; said credit on payment of charter not to impair ship-owners' lien on cargo for freight."

A carrier may, if he sees fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken.

Inasmuch as the delivery in this case was unconditional, the word "discharge" in the clause above quoted was held to refer to the unloading of the goods.

APPEAL in admiralty from a decree of the District Court of the United States for the District of Massachusetts. The libel was in the usual form of a libel *in rem* in a cause of contract civil and maritime, and was filed on the 17th of December, 1857, by Paul Sears, on behalf of himself and the other owners of the ship *Bold Hunter*, to recover a certain amount of freight earned by the ship on a voyage from Calcutta to Boston. On the 5th of March, 1858, Rufus Wills, as administrator of Augustine Wills, deceased, intervened for his interest in the goods described in the libel, and prayed restitution of the same, with costs. A decree dismissing the libel, with costs for the claimant, was entered in the District Court. All the material facts of the case were agreed between the parties, and were in substance as follows. In October, 1856, the libellants, owners of the ship before named, chartered her to Tuckerman, Townsend, & Co. for a voyage from Calcutta to Boston, at the rate of fifteen dollars and fifty cents for whole packages, and half that rate for loose stowage. The charter-party contained the usual lien claims,

and stipulated that freight should be paid, one half in five days and the balance in ten days after discharge in Boston ; said credit on payment of charter not to impair ship-owners' lien on cargo for freight. On arrival at Calcutta, the charterers failed to furnish an entire cargo, but procured some shipments, or freight, and among others, one to Augustine Wills of Boston, of a large amount, for which the master signed bills of lading in the usual form, at various rates of freight for different kinds of merchandise, and all less than the rates specified in the charter. The vessel arrived in Boston, October 12, 1857, and soon after commenced discharging. Meanwhile the charterers had passed over the bills of lading of the merchandise to the libellants, in part settlement of the charter-money ; and the libellant first named undertook to attend to the collection of the freight. At this time Augustine Wills was sick, and his business was transacted by the claimant, his brother, who acted as his agent. On the 2d of November, 1857, Augustine Wills died, and the claimant was appointed his administrator during the same month. Before the decease of the consignee the ship had commenced, and she completed the discharge of her cargo on the 7th of November. Before the death of the consignee, all the goods consigned to him were taken possession of by the claimant as his agent, and after his death they were retained by the claimant as the representative of the estate of the deceased. The larger portion of the merchandise was discharged at the claimant's request, and without being landed was, with the owner's consent, put into the Cyclone, bound to London, the claimant having informed the owners of the vessel, at the time of the transshipment, of his intention to reship the goods. Such of the cargo as remained was discharged, and delivered to the custody of the claimant or his agent, was by them conveyed to the custom-house stores, and there entered in bond in the name of Augustine Wills. Nothing was at any time said by the owners of the Bold Hunter of their intention to hold the goods, or any part thereof, for the freight, but the goods were all discharged and delivered without qualification. Before the death of Augustine Wills, the claimant, as his agent, at the request of the libellant, Sears, who represented

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that it would be an accommodation, paid Sears five thousand dollars on account of the freight. After the decease of Augustine Wills, and after the discharge was completed, Sears applied to the claimant for the balance of the freight, and was informed that nothing could be done until administration was taken out, when he hoped it would be satisfactorily adjusted, or words to that effect. Other applications for payment were made after the expiration of the five and ten days, and after administration was taken out, to which the respondent answered that he was not sure how the estate would turn out, and that he could not safely pay while any doubt remained. On one occasion, when applying for payment, the libellant replied, that he had been blamed by the other parties in interest for not holding on to the goods, and supposed he had lost his lien. This statement was not admitted by the libellant, though he consented to have it presented, reserving the right to require proof thereof, if the court should deem it material. It was also agreed that the shippers, Wills & Co. of Calcutta, knew that the ship was under charter, and shipped goods to other parties besides Augustine Wills, the consignee, who was not a member of Wills & Co., but doing business on his own account in Boston.

Upon these facts, and the inferences to be drawn therefrom, if the court was of the opinion that the lien was lost, and the libellants were not entitled to hold the goods libelled for freight, then the libel should be dismissed with costs; otherwise, libellants were to have judgment for the balance of freight, with interest and costs.

F. C. Loring, for libellants.

Story and May, for claimant.

CLIFFORD, J. It is insisted by the libellants that the goods consigned to Augustine Wills were discharged from the vessel and delivered to his agent without any intention on either side that the lien or privilege of the carrier should thereby be waived or impaired. On the part of the respondent, it is insisted that by the delivery of the goods under the circumstances of this case the libellants waived their right to any lien thereon, and must rely upon the personal responsibility of the consignee. Some ground of inference that it was the intention of the libellants to waive the

lien on the delivery of the goods, is afforded from the admitted fact that they consented, without reservation, after the vessel arrived at her port of destination, to allow the consignee or his agent to reship a large portion of the consignment to the London market for sale. All that portion of the goods were not landed from the vessel, but were transshipped into the Cyclone, which was lying alongside for that purpose, and with a perfect understanding between the parties that they were to be sent out of the jurisdiction of the Federal courts. They were delivered without objection and without any arrangement in respect to the balance of freight, which remained unpaid. Delivery under such circumstances, especially when accompanied by part payment of the freight, as in this case, must be considered as a relinquishment of the lien upon the goods so delivered. That conclusion rests upon two grounds, either of which is sufficient for its support, — first, that the delivery was unconditional, and was made under circumstances clearly indicating an intention that the lien should be displaced ; and, secondly, because the libellants well knew that the goods were designed for sale, and that in the usual course of business they would immediately pass into the hands of innocent purchasers. It may then be assumed that the goods delivered to be reshipped to London were fully discharged of all claim for the balance of the freight remaining due to the libellants. That circumstance, however, is not conclusive in respect to those which remained, as a carrier may, if he sees fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken. A delivery of a part of the goods, therefore, without the payment of freight, cannot affect the question under consideration, except so far as the attending circumstances afford a ground of presumption, in connection with the other facts and circumstances in the case, that it was the intention of the libellants to relinquish the lien upon the residue ; and it is proper to remark, that those attending circumstances, standing alone, would clearly be insufficient to justify that conclusion, and if nothing more appeared to support that view of the case, the libellants would be entitled to prevail in the suit. But those

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circumstances do not stand alone, as the subsequent conduct of the libellants abundantly shows. They did not retain the possession of the residue of the goods after the Cyclone departed on her voyage. All that remained were discharged early in November, and were unconditionally delivered into the custody of the claimant as the representative of the consignee, and were by him placed in warehouse, and there entered in bond in the name of the original consignee.

Discharge and delivery were commenced shortly after the vessel arrived at her port of destination, which was on the 12th of October, 1857, and were fully completed on the 7th of November following. Nothing was said at any time by the owners of the vessel, either during the discharge and delivery of the goods or afterwards, of their intention to hold the goods or any part of them for the freight, and the case furnishes no ground to infer that any attempt was made to negotiate any arrangement to that effect. On the contrary, it is expressly agreed between the parties, that the goods were all discharged and delivered without qualification. Administration on the estate of Augustine Wills was taken out by the claimant, in November, 1857, and more than four months elapsed after his appointment before the libel was filed. All the goods not reshipped remained throughout that period in the custody of the claimant, as administrator of that estate, and were claimed by him as belonging to the estate of the decedent. After his appointment, the libellants made application, in repeated instances, for the payment of the balance of the freight, which was refused or declined by the claimant as often as it was made, and yet it does not appear that the libellants even so much as intimated, on any one of those occasions, that they had any lien upon the goods described in the libel. On one or more occasions, when those applications were made, the libellants were informed by the claimant that he would not pay their demand, until it was ascertained how the estate was likely to turn out; and there is much reason to infer, from the statement of facts, that the doubts which have since arisen as to the solvency of the estate have had too much influence in convincing the libellants of the justice of their case. Five and

ten days' credit was given by the charter-party for the payment of freight, after the goods were discharged in Boston, and it was stipulated that the credit so given, on the payment of the charter, should not impair the lien of the ship-owners on the cargo, for freight; and, therefore, it is insisted by the counsel of the libellants, that the case does not show an absolute delivery of the goods, which it is admitted would furnish strong, if not conclusive, evidence of a waiver of the lien. Two errors, however, are observable in the reasoning by which that conclusion is reached, which will now be pointed out. In the first place, the counsel assumes that the word "discharge," as used in the charter-party, is equivalent to the word "delivery," and that the credit contracted to be given for the freight was five and ten days after the goods were delivered to the consignee at the port of destination. Such are not the words of the charter-party, and the construction assumed, in the opinion of the court, would be unwarranted and unreasonable, as its effect would be to defeat the lien altogether. Ship-owners, so long as they continue in possession of the ship, are in possession also of the goods carried by her, and their right to a lien on the goods for the freight due in respect to such goods, whether by charter-party or under a bill of lading, is beyond question. They may, if they think proper, part with that possession, and relinquish their right to hold the goods; and in general the lien is not supposed to exist where the parties have, by their agreement, regulated the time and manner of paying the freight, so that the cargo is to be absolutely delivered before the time fixed for the payment of freight. Abbt. on Ship. (5th Am. ed.) 365. *Chandler v. Belden*, 18 Johns. 157. Judge Story accordingly said, in the case of *The Volunteer*, 1 Sumn. 551, that it is well known that, by the common law, there is in general a lien on the goods shipped for the freight thereon, whether it arise under a common bill of lading or under a charter-party, but that this lien may be waived by consent; and in cases of charter-parties it often becomes a question whether the stipulations are or are not inconsistent with the lien, as, for instance, if the delivery of the goods is, by the charter-party, to precede the payment or security of payment of freight, such a stipulation fur-

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nishes a clear dispensation with the lien for freight, for it is repugnant to it and incompatible with it. That case was cited and approved in *Raymond v. Tyson*, 17 How. 61, decided by the Supreme Court in 1854, where the same doctrine was distinctly reaffirmed. A similar question was again presented in this circuit in the case of *Certain Logs of Mahogany*, 2 Sumn. 589, and the same learned judge held that the word "discharged," as used in the charter-party, then before him, referred to the unlading of the goods, and not to the delivery of the cargo; and he admitted, in that case, also, that a contrary construction would defeat the right of the owners to any lien for freight. This view of the question also derives support from the language employed in the bill of lading, which is made a part of the case. By a fair construction of the bill of lading, the freight was payable at the same time that the goods were delivered. According to its material words the goods were to be delivered at the port of Boston, "unto Augustine Wills or to his assigns, he or they paying freight for the goods at the rate of eleven dollars per ton." Payment of freight and the delivery of the goods were obviously required by that instrument to be contemporaneous, and there is nothing in the language of the charter-party inconsistent with that view of the contract. These considerations lead necessarily to the conclusion that the word "discharge," as used in the charter-party, referred to the unlading of the goods after the arrival of the vessel, and not to the delivery of the consignment to the consignee, and that the parties did not stipulate for any credit upon the freight after the goods were delivered. In the second place, the argument for the libellants fails to give full force and effect to that part of the statement of facts wherein it is agreed by the parties that the goods were all discharged and delivered without qualification. All the authorities in the jurisprudence of the United States agree that an absolute delivery displaces the lien, and turns the party over to his remedy against the shipper or owner of the goods. That principle is so definitively settled in the courts of this country, that any examination of the authorities is unnecessary. They were delivered in this case without qualification, and so the parties have agreed; and it is difficult

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to see in what respect the delivery described in the agreed statement differs from that absolute delivery which all admit discharges the lien. Words more explicit or more comprehensive to express the act of absolute delivery could not well be selected, and when considered in connection with the subsequent conduct of the parties in respect to the same subject-matter, they must be regarded as decisive of the question.

The decree of the District Court, therefore, is affirmed, with costs.

JUDAH BAKER *et als.*, Libellants, v. STEAMSHIP CITY OF NEW YORK, Appellee.

Steamers having more power and speed than sailing vessels, and being more immediately subject to control, greater caution and vigilance are expected of those in charge of them to avoid collisions.

When a steamer and sailing vessel are approaching each other, the sailing vessel has, in general, a right to hold her course, and it is the duty of the steamer under such circumstances to adopt the necessary precautions to avoid a collision.

The steamer is *prima facie* chargeable if she fails in this, and a collision occurs.

If the sailing vessel fails to keep her course, the fault will in general be attributable to her, provided it appears that under the unexpected change of course by the sailing vessel the steamer used all reasonable exertions to avoid the danger.

These rules, however, cannot have any controlling application before the two vessels have approached to a point of danger, which renders their observance reasonably necessary.

No maritime usage requires merchant vessels constantly to carry lights.

Semble. If the absence of a light contributed to a collision in a harbor, or crowded thoroughfare, on a dark night, and one vessel showed a light and the other did not, it might well be held that the dark vessel, other things being equal, was in fault.

ADMIRALTY appeal from the District Court, in a cause of maritime collision. Ware, J., presiding.

The allegations of the libel were in substance as follows: on the 15th of December, 1855, the schooner George Engs, having on board a cargo of corn, flour, and iron, sailed from Philadelphia on a voyage to Boston. At half past three o'clock on the morning of the 19th of the same month, when steering about east-southeast, she made a light off her weather bow, which proved to be on board the steamer City of New York, bound from Boston to Philadelphia. The weather was perfectly clear when

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the steamer was first discovered, being at a distance of about five miles from the schooner, coming out between Block Island and Montauk Point, and steering about southwest by south. The schooner kept off east, on her course for Block Island, to give the steamer a wide berth. A short time afterward, when the steamer was nearly abreast the schooner, the mate of the schooner, who was at the helm, observing that the steamer was winding off towards him, immediately called all hands, and the master and mate both shouted to the steamer, which was four or five times her length to windward, to luff or hold her course so as to keep clear, which could then have been done. Immediately before the collision, the mate put up the helm of the schooner for the purpose of saving the lives of those on board. The schooner was struck by the steamer's bow, on her starboard and windward quarter, about ten feet from her taffrail, and sunk, with everything on board except the crew, in about fifteen minutes afterward. It was set up as matter of defence, that, after having made the steamer, the schooner changed her course and kept off more and more, until the collision occurred; also that the schooner showed no lights, and was not therefore discovered so soon by several minutes as she would have been had she conformed to the usual custom; that as soon as she was seen, the helm of the steamer was put to the starboard, to keep her off and give the schooner room, presuming she would keep her course; but shortly after, the schooner put off more from the wind, in consequence of which the danger of collision became apparent, upon which the engine was stopped and reversed, though too late to prevent the accident. The bows of the steamer struck the schooner near her main rigging.

C. W. Story, J. W. May, and B. R. Curtis, for libellants.

Thaxter and Bartlett, for respondents.

CLIFFORD, J. (after reciting the substance of the pleadings). Many of the circumstances attending the collision are admitted, and others are so fully proved, that they cannot properly be regarded as the subjects of dispute. A collision occurred between the two vessels, and the schooner was sunk and totally lost, with all her cargo, consisting of corn, corn-meal, flour,

and iron. She was a vessel of about one hundred and thirty tons burden, engaged in the coasting trade, and sailed from Philadelphia on the 15th of December, 1855, on a voyage to Boston, fully manned and equipped, and with a full cargo. On the 19th of the same month, at about half past three o'clock in the morning, when off the coast of Long Island, in the usual track of vessels sailing between those ports, and about three or four miles south to southwest from Montauk Point, she met the steamer City of New York, bound on a trip from Boston to Philadelphia, and the collision took place. Damages are claimed on the part of the schooner, on the ground that the collision is chargeable to the fault of the steamer, and the answer admits the collision and the loss, but denies that it was the fault of the steamer, and the respondents, as a matter of fact, insist that it was the fault of the schooner. It was a clear starlight night, but the moon had been down from a half-hour to an hour before the collision occurred. No light was shown on the schooner, but the steamer carried her usual lights, one forward and one on each quarter, and both the vessels had look-outs. It was the second mate's watch on board the schooner, from twelve o'clock at night to four in the morning, and he was at the wheel when the steamer was first discovered. At that time the steamer was about five miles distant, and the mate says the schooner was heading east by north, and that shortly afterward he put her off east for Block Island. The wind was then not far from north, and about a six-knot breeze. When the master went below, at twelve o'clock, he says the wind was about north and was not quite steady, and that the schooner was then heading east-northeast. Reardon, the second mate of the steamer, says that the wind, at the time he first discovered the schooner, which was not until the vessels had approached within half a mile of each other, was north-northwest. These statements respecting the course of the wind are not conflicting, and lead to the conclusion that its bearing at the time of the collision was at least one point west of north. At the time the mate of the schooner first discovered the steamer, and when he changed her course from east by north to east, the course of the steamer

was about southwest by south, and it is believed, from the evidence, that if she had kept that course a collision would not have occurred.

Allowing that the schooner was sailing five or six knots and the steamer about ten miles an hour, it is a reasonable calculation that they were approaching each other say at the rate of fifteen miles an hour, or one mile in four minutes. They were, therefore, about twenty minutes' sailing time apart when the schooner changed her course from east by north to east, and that change must have been made from fifteen to eighteen minutes before the schooner was discovered by any one on board the steamer. After that change was made, and before the schooner had been seen by the second mate of the steamer, the two vessels had advanced toward each other four and a half miles, which could not have been accomplished in much less than eighteen minutes at the rate of speed they were sailing. Assuming that the two vessels were approaching each other at the rate of a mile in four minutes, then the second mate of the steamer is mistaken in supposing that two minutes elapsed, after the engine was stopped, before the steamer struck the schooner, and his own testimony shows satisfactorily the error in his calculation. He admits that he gave the order to stop the engine, because he saw that the two vessels were coming together; and it was not until after he had noticed that the schooner had changed her course that he gave that order. When he first saw the schooner she was only about half a mile off, and that was before he had ordered the helm to be put hard a-starboard. What time elapsed after he ordered the helm to be put hard a-starboard, and before he gave the order to stop the engine, will appear most satisfactorily by a comparison of his testimony with what transpired on board the schooner at that precise time. She was approaching the steamer on a course of east by north, and the mate says he continued that course until the steamer was nearly abreast of the schooner, when the lights of the steamer suddenly changed, and he saw that she was coming down on to the schooner. Seeing that, he called all hands, and while the master was coming up from below he hove the wheel up. He says, however, at the same

time, what it is important to notice, that the steamer struck the schooner before she could alter her course but very little, showing conclusively that the collision was inevitable irrespective of any change of course that was or could have been made. Before the master left the deck he directed the mate, on arriving near Montauk Point, to steer east for Block Island; and it is clearly proved that the change was made shortly after the steamer was first discovered, and that it was an order proper to be executed to carry the vessel on the usual route south of that island to Boston. In respect to the second change of course, it satisfactorily appears, both from the testimony of the second mate of the steamer and from the testimony of the mate of the schooner, who were in charge of their respective vessels, that it was not made until all chance of preventing the collision was gone. It is admitted in the answer that this last change was made after the helm of the steamer had been put to the starboard, and so is the testimony of the second mate of the steamer, by whom the order to starboard the helm was given. Two seamen, also, who were on board the steamer, testify to the same effect. They say, in substance, that after the wheel of the steamer was put hard a-starboard, and she had begun to pay off, they noticed that the schooner had her wheel hard a-port, and that she also had begun to pay off. It is true, that the mate of the schooner, after he discovered that the collision was inevitable, hove the wheel up, and it may be that she had begun to pay off when the collision occurred; but it is fully proved that her course had not been altered enough to affect the result, except, perhaps, to shift the blow from one part of the schooner to another. When the mate called all hands, the master says he jumped on deck, and that the situation of the vessels at that time was such that it could have made no difference whether the schooner had luffed, wound off, or kept a straight course. Shockley, the engineer of the steamer, says that he received the order from the second mate to stop the engine just before the steamer actually came in collision with the schooner. He estimates the time that elapsed after the order and before the collision at about a minute, but says he had just time to close the throttle-valve, and that it was the only order he re-

ceived, although, from the quick way in which it was given, he expected that the order to reverse would immediately follow, and accordingly unhooked the engine and threw her into the back motion. It was to the change of course last made on the part of the schooner that the second mate of the steamer referred in his testimony, when he said that, after he ordered the helm to be put hard a-starboard, he noticed the schooner had altered her course more to the eastward, and not to the change from east by north to east, which had been made twenty minutes before, when the two vessels were five miles apart. He was referring to a change of course which he himself had seen, and not to one made at least fifteen minutes before the schooner had been discovered by any one on board the steamer. After the mate of the schooner first discovered the steamer, two changes were made in the course of the schooner, and only two, as conclusively appears by a careful comparison of all the testimony in the case. One was made when the two vessels were about five miles apart, and at least fifteen minutes before any one on board the steamer had discovered the schooner, and the other not until the vessels were in such close proximity that a collision was inevitable; and throughout all the intermediate period the schooner held her course without any change of the wheel whatever. Some change also was made in the course of the steamer after the second mate was informed by the lookout that a sail had been discovered on the starboard bow. How much change was made in the first instance does not appear; and the man at the wheel says that the first he knew of the matter was, that the second mate ordered the helm hard a-starboard, and that he executed the order as soon as it was received, leaving it to be inferred either that no previous order had been given, or, if given, that it had not been understood or obeyed. He had not seen the schooner when he executed that order, and when he did see her he says that she was heading towards the steamer, but omits to state what time had elapsed after the order was given before he saw her and the distance between the two vessels. His estimate that three minutes elapsed after the order was executed before the collision occurred is contrary to all the other evidence in the case, and therefore cannot be ad-

mitted to be correct. Howlett first discovered the schooner, and he says that he sang out twice to the second mate that there was a sail ahead, and he heard that officer singing out to the man in the wheel-house to put the helm hard a-starboard, and this was before the witness had ascertained the bearing of the schooner ; and the second mate admits that he could not tell at that time which way the schooner was going, whether east-northeast or west-northwest, and yet he says he gave the order, and it was promptly executed, and it does not appear that it was countermanded before the collision. All these facts are so clearly proved, that it is difficult to see how they can be misunderstood. On this state of the evidence the respondents insist, in the first place, that the schooner was in fault, because she changed her course shortly after the mate of the schooner first discovered the steamer, and at the time when the two vessels were about five miles apart. That change did not exceed two points in any view of the evidence, and, according to the testimony of the mate, who had charge of the deck and made the change, it was but one point from east by north to east, and was one proper to be made to carry the vessel on her intended route south of Block Island.

I. Steam vessels, having more power and speed than sailing vessels, and being more immediately subject to control, greater caution and vigilance are exacted of those in charge of them to avoid collisions. Consequently a sailing vessel, whether close-hauled or with a free wind, when a steamer is approaching, has in general a right to keep her course ; and it is the duty of the steamer under such circumstances to adopt such precautions as to avoid a collision ; and if she does not, and a collision occurs, the steamer is *prima facie* chargeable ; and in order that the steamer may not be baffled in her purpose to adopt such precautions, it is the duty of the sailing vessel to keep her course as though there was no danger ; and if she fails to do so, the fault will, in general, be attributable to her, provided it also appears that the steamer used all reasonable exertions to avoid the danger under the unexpected change of course on the part of the sailing vessel. *The St. John* v. *Paine*, 10 How. 583 ; *The Oregon* v. *Weld*, 18 How. 571 ; *The Clement*, 2 Cur. 363. These rules

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of navigation ought to be strictly adhered to in all cases where they are applicable. They were prescribed to prevent collisions and for the ascertainment of the rights of parties, after they have occurred, in cases to which they apply. They cannot, however, have any controlling application before the two vessels have approached to a point of danger which brings them into exercise, and makes their observance reasonably necessary in order to fulfil the purpose which they were designed to accomplish. Accordingly it was held by the Supreme Court, in the case of *The Propeller Monticello v. Mollison*, 17 How. 154, that they did not apply in a case where the approaching vessels were seven miles apart, it appearing, as in this case, that the change of course on the part of the sailing vessel was made before she had been seen by the steamer; and in *Newton v. Stebbins*, 10 How. 606, the same court held that the sailing vessel was not in fault, although the distance between her and the steamer when she changed her course was only three or four miles, and the change of course had been made by her after she had been seen by the steamer. A change of course under such circumstances, if made into the pathway of the approaching steamer, could not be justified, unless it also appeared that the steamer was guilty of negligence in not avoiding the danger. The change made in this case, however, was not of that character; and there is no evidence having the least tendency to show that it had the effect to baffle any precaution which those on board the steamer adopted or intended to adopt. Both these suggestions are disproved, as fully appears from the evidence already stated. When that change was made, there was no danger of collision, and if the steamer had kept her course it would not have occurred; and inasmuch as it did not in any manner contribute to the disaster, it was not a fault on the part of the schooner. *The Genesee Chief*, 12 How. 461.

II. It is contended, in the second place, by the respondents, that the schooner was in fault because she changed her course after she was seen by those on board the steamer. When the schooner was first seen by the second mate of the steamer, the latter was sailing about ten miles an hour, and he says the schooner was about a half-mile off, and he admits that he ordered her helm

put hard a-starboard just as quick as he could, and that about two minutes elapsed before he gave the order to stop the engine ; thus fully confirming the engineer, who says he received the order just before the steamer actually came in collision with the schooner. They were approaching each other at the rate of a mile in four minutes ; and it appearing that they were but a half-mile apart when the order to starboard the helm was given, it shows to a demonstration that the speed of the steamer was not reduced until the instant of collision ; and this confirms the testimony of the mate of the schooner, that she had not time after he hove up her wheel to make any considerable change in her course, and strongly corroborates the testimony of the master, that it would not have made any difference whether she had luffed, wound off, or kept a straight course, as the collision was then inevitable. Rules of navigation were designed to afford security to life and property on the high seas and other navigable waters, by preventing collisions, and cannot be invoked by those who have rendered their observance impracticable or imminently dangerous to human life. A change of course under such circumstances is not a fault, and certainly not when, as in this case, it appears that it did not contribute to the collision. *The Birkenhead*, 3 W. Rob. 76 ; *The Rose*, 2 W. Rob. 1 ; *The James Watt*, 2 W. Rob. 271.

III. It is insisted, lastly, by the respondents, that the schooner was in fault because she did not show any light prior to, and at the time of, the collision, and reference is made to a case decided in the Third Circuit to support that proposition. In that case the court expressed the opinion that sailing vessels navigating in harbors and thoroughfares in a dark night, where they are constantly liable to meet steamers, ought to show a light ; and signified in strong terms, that between a vessel under such circumstances, with a light, and another without a light, other things being equal, they would hold the dark vessel to be in fault ; admitting, however, at the same time, that there is no law requiring vessels navigating the high seas to carry signal-lights, and that courts of justice cannot establish any such rule, and make it obligatory on such vessels. *Bark Delaware v. Steamer Osprey*, 2 Wal. Jr. 268.

No maritime usage requires merchant vessels constantly to carry lights, and it is understood there is some difference of opinion among navigators as to its expediency, especially when navigating along the coast, where the lights on board vessels are liable to be mistaken for land lights, and thus by deceiving other vessels as to their own true position, bring them into danger. In harbors and crowded thoroughfares the balance of safety would seem to be in favor of showing a light. Such were the views of the district judge, and they are believed to be correct; and where that precaution is omitted in such thoroughfares, on a dark night, and it appears that the absence of a light contributed to the collision, and that the colliding vessel showed a light and used all reasonable exertions to prevent the collision, it might well be held that the dark vessel, other things being equal, was in fault. That principle, however, cannot have any application to this case for several reasons apparent on an examination of the facts. Here the collision occurred on a clear starlight night, when several of the witnesses, who are experienced navigators, say that the schooner could have been seen two or three miles. Others say that a schooner in such a night might be seen a mile and a half or two miles, and some enlarge the distance three or four miles. Not a doubt is entertained that she might and ought to have been seen much earlier, if the lookouts on the steamer had been vigilant in the performance of their duty.

IV. Lookouts are valueless unless they are vigilantly employed on their duty; and whenever it appears that they are not so employed on board steamers, it must be considered as the fault of the steamer. Vessels propelled by steam have command of their own course and their own speed, and it is their duty, where there is room, to pass an approaching sailing vessel at such a distance as to avoid all danger; and if in consequence of the omission of duty on the part of lookouts, or their negligence, the approaching sailing vessel is not seen in season to prevent a collision, the fault is properly chargeable to the steamer, unless the sailing vessel was also guilty of a violation of the rules of navigation. *The Genesee Chief*, 12 How. 463. These reasons, together with those already mentioned

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responsive to the preceding propositions, lead necessarily to the conclusion that the collision was the fault of the steamer. Some evidence is exhibited in the case tending to show a local usage for sailing vessels to carry lights in the harbor of Boston. The effect of such a usage, if proved, it is not necessary now to consider, as the evidence introduced is not sufficient to show its existence. The decree of the District Court is therefore reversed, and a decree must be entered for the libellants.

RHODE ISLAND DISTRICT.

JUNE TERM, 1858.

THE BANK OF SOUTH CAROLINA, IN EQUITY, v. BICKNELL AND SKINNER AND THE COMMERCIAL INSURANCE COMPANY.

Where goods are shipped to consignees, to be sold on commission, and the consignees, for their own benefit, insure their interest to an amount equal to the value of the goods, and the goods are lost, there is no privity of contract between the consignor and the insurance company on which a right of action against the company could be founded.

Consignees of goods for sale on commission, being in advance to the consignors, or under acceptances for them, as in this case, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds to their own benefit to the extent of their claims in respect of such advances and acceptances, and perhaps of their commissions. But though they have this insurable interest, they are not, merely in their character as such consignees, vested with any authority to effect insurance for their principal on the consignment while it is in transit.

BILL in equity praying, among other things, that the corporation complainant might be declared entitled to recover the amount of a certain policy of insurance from the corporation defendants, on a quantity of cotton, in the same manner as if the insurance had been effected in their name; that the insurance company might be ordered to pay the same accordingly; and that the other defendants might be enjoined from commencing any proceedings to collect the insurance money, except at the request and for

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the benefit of the complainants. Most of the facts were either admitted by the pleadings or not made a subject of controversy.

Michael Lazarus of Charleston, South Carolina, purchased and owned forty-two bales of cotton, which he shipped from that port on the 1st of August, 1857, in the Emily Ward, to the first-named respondents, to be sold by them, as his agents, on commission. At the time of shipment he took a bill of lading from the agent of the vessel, and on the same day drew a bill of exchange on the respondents against the shipment for two thousand four hundred dollars, payable to his own order sixty days after sight, which sum was less than the value of the consignment. Immediately on drawing the bill of exchange, being otherwise unable to pay for the cotton, he indorsed the bill of exchange, presented it at the bank for payment, and, upon indorsing the bill of lading as security, obtained the money. The bill was forwarded to the drawees, and by them accepted on the 25th of the same month. On the same day the drawees insured the cotton in their own name for the sum of three thousand five hundred dollars in an open policy then held by them, executed by the corporation defendants, which policy bore date the 9th of January, 1857, and was taken out on that day. Both vessel and cargo were lost by the perils of the sea. Before the maturity of the bill of exchange the first-named respondents became insolvent, and refused to pay. Demand was made upon the respondents, the bill of exchange and the amount of the premium being first tendered to them. The complainant alleged that the first-named respondents had endeavored to collect the policy in order to deprive the bank of all benefit from the insurance; that the bank had the right to collect and receive the money in the same manner as it would have been entitled to stop the cotton *in transitu*, or as it might, if the loss had not occurred, have recovered possession of the cotton upon returning the acceptance, and paying the charges and expenses of the consignment.

It was alleged in the answer, that the contract of insurance was made solely between the first-named respondents and the insurance company, without any instructions, express or implied,

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from the complainants; that the premium is a charge against the insurers, and must be paid out of their estate; that the insurance was effected upon their own interest in the cotton, growing out of their acceptance of the bill of exchange; and that complainant had no interest in the contract either at law or in equity.

T. A. Jenckes, for complainant.

The plaintiff, being a principal, may follow his property or the substitute, if it can be identified, into the hands of the defendants, Bicknell and Skinner, as they are agents, subject only to advance, commissions, and expenses. 2 Story's Eq. Juris. § 1258, n. 2; Story's Agency, §§ 229, 230, 231; *Veil v. Mitchell, Adm'r*, 4 Wash. C. C. 105; 1 Am. Lead. Cas. 674; *Thompson v. Perkins*, 3 Mas. 232; *Yates & al. v. Curtis*, 5 Mas. 80.

The insurance money is the substitute of the plaintiff's property, insurance being a contract of indemnity or security. Ang. on Ins. 1; 3 Kent, Com. 320.

Bicknell and Skinner's only insurable interest in plaintiff's cotton being their liability to pay his draft against them, they are mere trustees of the insurance money, in case of loss, for this purpose; and if they are released from all liability on the draft, and their expenses are all paid, they are the unconditional trustees of the insurance money for his use. *Lazarus v. Com. Ins. Co.*, 2 Am. Lead. Cas. 545, and note.

F. E. Hoppin and *C. S. Bradley*, for respondents, Bicknell and Skinner.

A consignee, factor, or agent, having accepted bills of exchange upon certain goods (like these defendants), stands in the same situation as a mortgagee, and has an *insurable interest* in the goods entirely distinct from that of his consignor. 1 Phill. on Ins. § 289, p. 166, § 309; 2 Phill. on Ins. § 1243; *Wolf v. Horncastle*, 1 B. & P. 316; *Godin v. London Assurance Co.*, 1 Burr. 490.

This policy, having been obtained by the defendants, as consignees, upon their interest, and with their money, and without the privity or direction of the consignor, belongs to the defendants only, and the proceeds of it, representing only the interest

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of the defendants, cannot be taken by the consignor or his assigns. *Neale v. Reid*, 1 B. & C. 657; 1 Ang. on Ins. § 60, *a* and *b*, § 73; *King v. State M. F. Ins. Co.*, 7 Cush. 1; *Dobson v. Land*, 8 Hare, 216; *White v. Brown*, 2 Cush. 41, 417.

There is no analogy between this case and the right of stoppage *in transitu* as claimed by complainant's bill; and if there be any, it is fatal to the claim of the consignors if pretended to be exercised.

A court of equity has no jurisdiction in this case.

CLIFFORD, J. Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss or damage arising from certain perils or sea-risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or for a certain period of time. 1 Arn. on Ins. p. 2. Like other valid engagements between business men, it requires two parties to make the contract; and as a general rule no person can maintain a suit on the policy against the insurers, unless he is named in the instrument, or unless there is some privity of contract, express or implied, by assignment or otherwise, between himself and the other contracting party. Were there no other difficulty in the way of the complainant than the entire absence of all privity of contract between himself and the insurance company, that alone would be sufficient to defeat the right of recovery. Insurance on the goods in question was effected by the first-named respondents without instructions either from the consignor or the complainant, and without their knowledge or consent. They so allege in the answer, and every fact and circumstance disclosed in the record touching the transaction, goes to confirm the truth of the allegation. Neither the consignor nor the bank requested the cotton to be insured, or knew that the policy was in existence, until after the loss; and the whole record shows that, in point of fact, the insurance was effected for the sole and exclusive benefit of the first-named respondents. Their policy bears date more than seven months before the bill of exchange was passed to the bank, and the terms of the indorsement on the policy furnish no grounds to infer that any other interest in the cotton was in-

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cluded in the insurance than that held by the consignees. Whether we look, therefore, at the terms of the policy, or of the indorsement on the same, or at the entire circumstances of the transaction, there is an utter failure of proof to establish any privity of contract between the complainant or the consignor and the insurance company, or to furnish any ground of inference in that direction. Both the consignor and the complainant corporation respectively had an insurable interest in the cotton, and either or both might have protected that interest against the perils of the voyage. Having chosen to do otherwise, and to remain their own insurers to the extent of their respective interests, they must stand the consequences of their own election. *King v. The State M. F. Ins. Co.*, 7 Cush. 5.

But another answer may be given to the claim of the complainant in its present form, which is equally decisive against it. When the first-named respondents received notice of the consignment and had accepted the bill of exchange drawn against it, they thereby acquired an insurable interest in the cotton, which they might properly insure for their own security. They accordingly proposed to enter the risk under their open policy, with the corporation respondents; and the answer alleges that the insurance was effected by them upon their interest in the cotton, and that the complainant has no interest in the proceeds of the insurance, either at law or in equity. Consignees who have a mere naked right to take possession of the goods consigned, without being either intrusted to sell the goods on commission, or having a lien upon them for their advances, cannot make a valid insurance of the same in their own names for their own benefit, for the reason that they have no legal property in the subject-matter of the consignment, and therefore can only effect insurance on account of those who are so interested, and must aver the interest in those on whose account the insurance was made. *Wolff v. Horncastle*, 1 B. & P. 316; 1 Arn. on Ins. p. 246. But consignees who have a lien or claim on the property, in respect of advances, or as commission agents, to whom it is intrusted for the purposes of sale, or as indorsees of the bill of lading, to whom a general balance is due, may effect an insur-

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ance on the property in their own names and on their own account, to its whole value, and recover thereon, at least to the amount of their lien, claim, or balance, although they have received no previous instructions from the consignor to insure, nor any subsequent ratification of the insurance. Where goods were consigned by a merchant to his factor, to whom a general balance was due, it was held by Lord Mansfield, in *Godin v. The London Assurance Co.*, 1 Burr. 489, that such factor had an insurable interest in the goods so consigned, to the extent of his general balance, and might recover thereon, averring the interest to be in himself; and this, though the bill of lading had been indorsed to another party. In the same case, the party to whom the bill of lading had been indorsed, and to whom the merchant was also indebted for advances to a greater amount than the value of the cargo, was held clearly to have an insurable interest, and to be entitled to recover, under a policy effected on his own account, the full value of the insurance. As a general principle, there can be no doubt that consignees of goods being in advance to the consignors, or under acceptances for them, as in this case, may insure in their own name and on their own account, to the full value of the goods, and apply the proceeds to their own benefit, to the extent of their claims in respect of such advances and acceptances. But a consignee to whom property is consigned to be sold by him merely as factor of the consignor, or other party, though he has himself an insurable interest of his own to the amount of his advances, and perhaps of his commissions, is not merely, in his character as such consignee, vested with any authority to effect insurance on the consignment for his principal, while it is in transit. Any insurance so made by him, without instructions, will therefore be a voluntary insurance, so far as the principal is concerned, and its validity will depend upon its being ratified by the party for whose benefit it was made. 2 Phill. on Ins. (4th ed.) § 1858. From the general principle, that any executor having a claim on property has an insurable interest to the extent of his claim, it follows, says Mr. Arnould, that a mortgagee of a ship or goods has a distinct insurable interest in the mortgaged property, and may recover, in an action upon a

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policy effected for his benefit, averring the interest to be in himself, to the full amount of the debt, to secure which the mortgage was made. Mr. Phillips says that a consignee, factor, or agent, having a lien on goods to the amount of his advances, acceptances, and liabilities, stands in this respect precisely in the situation of a mortgagee; and as a general proposition we think his view of the subject is correct. 1 Phill. on Ins. (4th ed.) § 309. Applying these principles to the present case, it is clear that the first-named respondents had an insurable interest in the cotton to the amount of the acceptances they had made in that behalf, and, perhaps, also for such commissions as they would have been entitled to receive for the sale of the same in case it had not been lost on the voyage. According to the decision in *Putnam v. The M. Mar. Ins. Co.*, 5 Met. 386, a commission merchant, to whom goods are consigned for sale, has an insurable interest in the goods, to the amount of his commissions on the sale, from the time the goods were shipped under the consignment; and the same court held, that he might make a valid insurance in anticipation of the consignment, and that the contract would take effect on the consignment being made, and the goods becoming subject to the risks insured against in the policy. Be that as it may, all the well-considered cases agree that a commission merchant or factor has a lien on the goods, to the amount of his advances, or acceptances, and that is sufficient to dispose of the case made in the bill of complaint. Courts of justice are not quite agreed whether the factor, in case the insurance exceeds the amount of his claim, may retain the excess to his own use, or whether he must be regarded as holding such residue in trust for the consignor. Some remarks of Mr. Justice Story, in the case of *Carpenter v. The Prov. Wash. Ins. Co.*, 16 Pet. 507, indicate that his opinion was in favor of the latter theory. That case arose on a policy of insurance against loss by fire. He admits, however, that both mortgagor and mortgagee may each separately insure his own distinct interest in the property; and that where the mortgagee insures solely on his own account, if his debt be paid, the policy ceases to have any operation from that time; and if the premises

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be subsequently consumed, the mortgagor can take no advantage of the policy, for the reason that he has no interest in it. Remarks are also to be found in the opinion of the court in *Robertson v. Hamilton*, 14 East, 522, favoring the same theory. On the other hand, the Supreme Court of Massachusetts, in the case of *King v. The State M. F. Ins. Co.*, 7 Cush. 1, held, in an elaborate opinion upon the question, that a mortgagee, who, at his own expense, insured his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest in case of a loss by fire before payment of the mortgage debt, has a right to recover the amount of the loss to his own use, without first assigning his mortgage or any part thereof to the insurers. To the same effect, also, are the remarks of Bayley, J., in *Neale v. Reid et al.*, 1 B. & C. 657. He says it has never been decided that a person not bound to insure, but who elects to insure in order to cover payments if the goods do not arrive, may not apply the proceeds of the policy to his own use. The premium for the insurance comes out of the general means of the party effecting it, and diminishes the fund applicable to the claims of general creditors. As between them and the seller of the particular goods, they certainly would be entitled to the money secured by the policy. It is not the produce of the goods, but is a substitute for it, and not liable to the same burdens. *Dobson v. Land*, 8 Hare, 216. Policies of insurance often contain clauses indicating the intention of the parties to include within the benefits of the contract other interests than those of the party therein named; and whenever such a clause appears in the instrument, courts of justice are always inclined to give it an equitable and liberal construction. Such was the case of *De Forrest v. The Fulton F. & M. Ins. Co.*, 1 Hall R. 84, where the policy was effected "on goods as well the property of the assured as held by them in trust, or on commission." Advances had been made by the commission merchant to only part of the amount insured, and the question was, whether they had an insurable interest to the whole amount of the policy. On this state of the case the court held that the consignees had an insurable interest in the goods, on account of

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Wakefield *et als.* v. Steamer Governor.

their own interest and as trustees, to their full value, which was covered by a policy in this form : they being liable to account to their principals for the excess of the insurance over the amount of their own claims. *Carruthers v. Sheddon*, 6 Taunt. 14. None of these cases, however, decide that where the insurance was effected solely on account of the interest of the factor, and where the pleadings and proofs show an entire want of privity of contract between the party complainant and the insurers, that the former can in any manner derive any benefit from the insurance. But that question, in the judgment of this court, does not arise in this case, on the present state of the pleadings ; and for that reason we forbear to express any decisive opinion upon the subject. Bill dismissed with costs.

MAINE DISTRICT.

SEPTEMBER TERM, 1858.

JAMES WAKEFIELD *et als.*, Libellants, v. THE STEAMER GOVERNOR,
Appellant.

When a steamer and sailing vessel are approaching each other, and the sailing vessel is put on a new course, she is bound to keep it, and it is the duty of the steamer to keep out of the way.

In the daytime, in good weather, in a place where there is no want of sea-room, and no obstructions to the navigation, the sailing vessel must hold her course, and the steamer must adopt the necessary precautions to avoid a collision.

Precautions must be seasonable in order to be effectual, and if not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity of precautionary measures was not perceived until it was too late to render them availing.

ADMIRALTY appeal from the District Court of Maine, in a cause of collision.

The schooner *Pennsylvania* sailed from Boston on the 25th of May, 1856, laden with a cargo of merchandise, and bound on a voyage to Bath.

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While beating up the Kennebec River, about six o'clock in the afternoon of the following day, and when she was within two miles of her place of destination, the master discovered the steamer Governor approaching in a southerly direction.

At that time the wind was fresh from the northeast, and the schooner was close-hauled on the larboard tack. The usual course of steamers was to pass to westward of the schooner; and the master of the schooner, supposing the steamer would pursue the usual track, kept his course until the steamer, notwithstanding she was heading directly for the schooner, approached within speaking distance. He then motioned for the steamer to pass to the westward, of which no notice was taken by the master of the steamer, and, finding that she would inevitably run into the schooner, he put his helm hard up; but the steamer struck the schooner on her larboard bow, occasioning considerable damage. Such was the case as alleged by the complainants.

The answer set forth the circumstances as follows. Soon after the steamer left the wharf at Bath, — about six, P. M., — the master discovered the schooner in the river some two miles below, beating up against the wind, which was fresh from the north, and when thus discovered she was near the eastern shore on her starboard tack, heading towards the western shore. Supposing the schooner would keep on that tack until she approached near the western shore, a direction was given to the steamer such as to carry her astern of the schooner. There was ample room for the steamer to do this, and it would have been safely accomplished if the schooner had kept her course and completed her starboard tack; but when the two vessels were no more than a quarter or a third of a mile apart, the schooner suddenly put about before she had approached as near to the western shore as it was her duty to have done; and after putting about, instead of hauling close to the wind, she paid off several points, thus throwing herself directly in the track of the steamer and across her path. Upon discovering the management of the schooner, the master of the steamer instantly caused the whistle to be sounded, and by voice and gesture endeavored to warn the schooner to change her course; and he also ordered the engines to be reversed, so that the speed of the steamer was retarded, if not wholly checked.

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Upon these statements in the pleadings and the evidence in the case a decree was entered for the libellants, in the District Court.

Shepley and *Dana*, for libellants.

It is a general rule that a steamer is to be considered as a vessel having the wind free. 1 Parsons's Mar. Law, 197, 198.

When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision. *Oregon v. Rocca et al.*, 18 How. 570 ; *New York and Liverpool U. S. Mail S. S. Co. v. Rumball*, 21 How. 372.

George Evans, for respondents. Argued orally, but filed no brief.

CLIFFORD, J. All the witnesses who were on board the schooner testify that she was going in stays when they first saw the steamer, and that the steamer was then just leaving the wharf, which is on the western side of the river. Prior to tacking, the schooner had been standing in the opposite direction, heading to the shore from which the steamer started. When she tacked she headed to the eastern shore ; and the witnesses of the libellants say that the wind was northeast, and that the two vessels were about a mile and a half apart at the time the steamer left the wharf. Some fifteen minutes elapsed after the steamer started before the collision occurred ; and the witnesses on both sides agree that she was standing on a course inclining in a diagonal direction towards the eastern shore. She never changed her course from the time she left the wharf until the collision took place, although her master admits that the schooner had sailed a quarter of a mile on the larboard tack, and that at the time it occurred she was two thirds of the way across the river from the western shore. Among other things, he also states that the steamer left the wharf at six o'clock, that as she rounded the wharf he stepped forward into the pilot-house and saw the schooner midway the river, more than a mile distant, beating up against the wind. As he represents, the wind was then fresh from the north, and the schooner was on her starboard tack heading to the western shore.

Steamers, as it seems from the pleadings and evidence, usually pass down the western side of the channel ; but the master testifies that, after seeing the position and course of the schooner, he made up his mind to go past her stern, and he complains, that

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after running a short distance, and before she had approached as near to the western shore as she might have done, she went about and headed in the opposite direction. Having tacked, he insists that she ought to have kept close to the wind, and he affirms, instead of doing so, her main sheet was eased, causing her to pay off. Other witnesses, examined by the claimants, testify to the effect that the schooner paid off immediately after she came about near the western shore. But the master testifies, without qualification, that it was necessary for him to ease her mainsail sheet in consequence of her crippled condition, and that he kept her within five points of the wind, which was as near as she would conveniently lay. Before tacking, the schooner was heading towards the western shore near Trufant's Rock, and the weight of the testimony clearly shows that she proceeded as far on that tack as it was prudent for her to do. Most of the witnesses agree that she was going in stays when the steamer left the wharf; but even if the account of the matter as given by the master of the steamer be correct, that she had not then quite completed her starboard tack, still he must have known, when he set the course of the steamer, that the schooner would presently find it necessary to come about and proceed upon the other tack. He knew what the course of his own vessel was, and there is no good reason for believing that he was misled in regard to the direction of the schooner. Whatever alteration was made in her mainsail sheets took place immediately after she came about, and it is not believed that it was of a character to affect the question in dispute between these parties. After the schooner came about and was put upon the new course, she was bound to keep it, and it was the duty of the steamer to keep out of the way. *The Genesee Chief*, 12 How. 443; *New York and Liverpool Steamship Co. v. Rumball*, 21 How. 372. But the defence, as stated in the answer, is rested chiefly upon the ground that the schooner might have avoided the collision by coming up into the wind, or by paying off and heading south. Suggestions of that kind, under the circumstances of this case, are entitled to very little weight. Occurring as the collision did in the daytime, and in good weather, and at a place where there was no want of sea-room and no obstructions to the navigation, it is clearly a case where

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the rule applies that the sailing vessel shall keep her course and leave it to the steamer to adopt the necessary precautions to avoid a collision. That rule has been established upon great consideration, and will be enforced in every case where it applies. Repeated decisions of the Supreme Court have sanctioned the rule, and it is vain to suppose that it will now be relaxed or overlooked. Expert witnesses were examined by the respondents to show that it was not possible to sheer the steamer while she was under way, so as to have avoided the schooner in a less distance than a quarter or a third of a mile. Theoretical opinions must often be received with some qualification, but it is not necessary on the present occasion to determine whether those opinions were well or ill founded, for the reason that the schooner was seen by those on board the steamer at a much greater distance, and in ample time to have adopted every necessary precaution to have avoided the collision. Precautions must be seasonable in order to be effectual ; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the time it occurs ; but it is generally an easy matter to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other or both of the colliding vessels. Suppose it to be true that the steamer, after she had approached within a certain distance of the schooner, was not then able to sheer so as to avoid the collision, still, the proof of that fact only constitutes no defence in this case, because the fault consisted in unnecessarily placing herself in that situation. Those in charge of her well knew that, by the rules of navigation, the schooner was bound to hold her course, and that it was the duty of the steamer to keep out of the way. They had every facility before them to enable them to perform that duty, and it is no defence to say that they did not commence their efforts in season to render them effectual, because it is that very delay which renders the vessel liable. For these reasons I am of the opinion that the decision of the District Court was correct, and the decree is accordingly affirmed with costs.

UNITED STATES, BY INDICTMENT, v. JOHN A. HOLMES.

Testimony in chief, of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it.

Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account.

Testimony merely rebutting is inadmissible, in anticipation of the matters to be contradicted or explained.

Where evidence of acts, conduct, and declarations of the accused, at various periods of his life, is introduced in defence, to prove his insanity at the time of the commission of a crime, the prosecution, in rebuttal, is not limited to an explanation or denial of the particular acts, conduct, or declarations so put in evidence in behalf of the prisoner, but may offer evidence of other acts, conduct, or declarations of the accused to show that he was sane within the same period.

It is not necessary, in order to enable the proof of such other acts, conduct, and declarations to be regarded as rebutting testimony, that the prosecution should show the accused to be of sound mind at the time to which they refer.

The defence being insanity, the evidence of such acts, etc., is not an attack upon the character of the prisoner before he has put his character in issue, but is rebutting testimony, admitted in order that the jury may compare the prisoner's conduct on different occasions together, and thus judge understandingly upon the question in controversy.

Testimony legal in form, pertinent to the issue, and received without objection, cannot afterwards be stricken out by the court, merely because the foundation for its admission, by preliminary inquiry, has not been made.

Where the expression of an opinion of a witness not qualified to speak as an expert is so interwoven with the *res gestæ* as to be inseparable therefrom, and was therefore rehearsed by the witness in his account of the circumstances of a homicide, held, that the statement that such expression was made was legal testimony, and as such was as much the subject of contradiction as any other competent testimony, and may be rebutted by proof of an inconsistent statement out of court.

It is not necessary, in order to impart a rebutting character to testimony, that the contradiction should be complete and entire, but it is sufficient if it has a tendency to contradict or disprove the opposite statement.

Although a person when committing a crime be laboring under partial insanity, if he still understands the nature and character of the act, and its consequences, and has knowledge that it is wrong and criminal, and mental power enough to apply that knowledge to his own case, and to know if he did the act he would do wrong and deserve punishment, such partial insanity is not sufficient to exempt him from criminal responsibility.

Such is the law of this court and in many of the best-considered decisions in the State courts.

Review of the authorities upon the question.

Wherever partial insanity is set up as an excuse for crime, if it appears that the mind of the accused is merely weakened and clouded, but is not incapable of remembering, reasoning, and judging between right and wrong in respect to his particular act, to admit in such a case that he was impelled to the commission of the act by an uncontrollable impulse would be to disregard the test of responsibility which the law establishes.

THIS was an indictment for murder upon the high seas, and came before the court upon a motion for new trial. The grounds of the motion are sufficiently set forth in the opinion. It appeared from the testimony, that on the 12th of May, 1857, the American ship *Therese*, of which the accused was master, sailed from New York to Valparaiso, thence to Callao, thence to the Chincha Islands, and then back to Callao, at which place and time George W. Chadwick, the person alleged to have been murdered, shipped as a mariner on board the vessel for the homeward voyage to Hampton Roads. After the ship got this side of Cape Horn, and before the time of the homicide, a difficulty had arisen between the accused and Chadwick, in consequence of the latter having omitted to sing, while hauling at the lee brace, as sailors are accustomed to do, and the accused beat, maltreated, and threatened him in violent and profane language. Afterwards, meeting Chadwick on deck, the master adverted to this omission as a neglect of duty, and repeated his threats in still more violent terms. Some time subsequent to this occurrence, Chadwick was at the wheel, and the witnesses testified they heard the accused speaking to him from the cabin, and inquiring how the vessel was heading. The question was correctly answered, but the customary "sir" was omitted. Upon this the accused immediately called out again, "How is that you say?" and the answer was given the same as before. In a few minutes, the accused came up from the cabin with a belaying-pin in his hand, and began beating the sailor, Chadwick, with it, upon his head. The blows were continued after the sailor was prostrated on the deck, and until he regained his feet and started to run forward; he was soon brought back by the second mate, acting under the master's order, and the beating renewed, until he was covered with his own blood. He was then stripped, washed, — his clothes thrown overboard, — and triced up in the main rigging. The accused then took a strand of yarn, knotted it, and ordered the men to flog the sailor thus triced up, and the order was obeyed for some twenty minutes. After several times reproving the men for not striking hard enough, and inflicting several blows himself, the master doubled and knotted a piece of ratlin stuff, and

ordered this to be used in place of the yarn. Groans and cries several times escaped from the lips of the sufferer, but were in every instance silenced by the belaying-pin in the hands of the master. After a brief interval, during which the beaten man was carried to and brought back from the fore-castle, he was again beaten with the belaying-pin, again triced up in the rigging, and a second time flogged with the ratlin. On this second occasion, as the sailor, Chadwick, cried for mercy, the accused answered, "If you don't stop your noise, I'll kill you on the spot"; and thereupon renewed the blows with the belaying-pin upon his head, neck, and side, until he sank down, supported only by his hands, which were tied to the rigging. He was then taken down and laid on the deck, where unsuccessful efforts at resuscitation and bleeding, showed that he was dead. When it was found that life was extinct, the accused remained standing for a few moments in silence on the deck, and then, with his mates, retired to the cabin. They remained in the cabin about twenty minutes, when the mate came on deck, called all hands aft, told them that he now had charge of the ship, and that the captain was crazy. It was not denied, on the part of the accused, that the sailor, George W. Chadwick, came to his death by violence and by the hands of the accused; but the defence was placed solely upon the ground, that at the time the homicide was committed, the prisoner was so far insane as not to be criminally responsible for the act. Upon this question witnesses were introduced and examined, both by the defence and the prosecution, and acts, conduct, and declarations of the prisoner at different periods and under different circumstances, throughout nearly his whole life to the time of the arrest, were offered in evidence. Acts and declarations, and the constitution of the prisoner when quite young, were detailed and described in the testimony, as well as his conduct upon voyages remotely and immediately preceding the one during which the homicide was committed.

The jury returned a verdict of guilty.

The motion for a new trial was based upon certain alleged incorrect rulings of the court in the course of the trial, and upon alleged misdirections in matters of law in the final instructions given to the jury.

G. F. Shepley, United States District Attorney, for the prosecution.

G. Evans and *P. Barnes*, for the defence.

CLIFFORD, J. Motions for new trials in the Federal courts are not always exhibited to the court for verification before they are filed. Usually they are prepared by the party objecting to the verdict, within the time prescribed by the twenty-sixth rule, and not unfrequently are filed with the clerk of the court without any examination by the opposite side, where they sometimes remain upon the files until the argument, without any revision whatever. Drawn from the minutes of the counsel or from recollection, it not unfrequently happens that they require some correction in order that they may accord with the actual rulings and instructions of the court at the trial. No inconvenience results from the practice, as the whole subject is one entirely within the control of the court, whose undoubted province it is to revise such motions if any error has intervened, either at the time of the argument or when its opinion is finally delivered. *United States v. Gibert et al.*, 2 Sumn. 37.

Two classes of complaints are embraced in the motion, each containing several distinct objections to the action of the court. One class has respect solely to the rulings of the court in admitting or rejecting evidence in the course of the trial. Another and a distinct class has respect to the instructions given to the jury when the case was finally submitted to their determination. Those appertaining to the rulings of the court in admitting and rejecting evidence will first be considered, for the reasons that they were made in the progress of the trial, and that the weight of such objections cannot be satisfactorily determined without some reference to the circumstances of the case under which the evidence was offered. In considering this class of objections, therefore, it becomes necessary to recur to the proceedings in the trial, and somewhat to the evidence, as it was developed at the trial, in order that the exact circumstances under which each particular ruling was made may be fully and clearly understood.

According to the record, the indictment was filed in court on the 25th of September, 1858. It alleges to the effect that

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the prisoner, on the 22d of January, 1858, upon the high seas, out of the jurisdiction of any particular State, and within the admiralty and maritime jurisdiction of the United States and of this court, in and on board a certain American vessel called the *Therese*, in and upon one George W. Chadwick, piratically, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the prisoner with a certain instrument called a belaying-pin, in and upon the head, neck, back, and left side of him, the said George W. Chadwick, then and there on the high seas, in the vessel aforesaid, did strike, giving to him, the said George W. Chadwick, then and there, several mortal wounds, blows, and bruises, to wit: one mortal wound on the head of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise and wound on the neck of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise on the back of him, the said George W. Chadwick, of the length of six inches and of the depth of one inch; one mortal bruise on the left side of him, the said George W. Chadwick, of the length of four inches and of the breadth of two inches, of which mortal wounds and bruises the said George W. Chadwick then and there instantly died. It contains two counts, and in each there is the usual conclusion, charging that the prisoner, piratically, feloniously, wilfully, and of his malice aforethought, him, the said George W. Chadwick, in manner and form aforesaid, did kill and murder.

He was arraigned on the 28th of September, 1858, and pleaded that he was not guilty. His trial was commenced on the 5th of October following, pursuant to an assignment previously made at the request of his counsel. No objection is made to any of the proceedings at the trial, except what are contained in the motion under consideration. In opening the case, the district attorney confined his remarks to the discussion of the principles of law applicable to the charge made in the indictment, and to a brief statement of the evidence to be introduced to prove it. He called some seven or eight witnesses in the opening to prove the necessary allegations, to show the

jurisdiction of the court, the act of killing, as laid in the indictment, and all the material elements of the crime.

[At this point the court recapitulated the testimony which substantially appears in the foregoing statement.]

Such is the substance of the testimony produced by the government in the opening, so far as respects the jurisdiction of the court, the fact of homicide, and all the material elements of the crime charged in the indictment. Many other facts and circumstances material to the question, whether the prisoner was sane or insane when the act was committed, were elicited in the cross-examination, which it is unnecessary to reproduce in this investigation.

The testimony of the witnesses for the defence varied in several important particulars from the narration previously given by the government witnesses. Many new facts were also stated, which had more or less bearing upon the question of sanity or insanity presented by the defence. That remark is more particularly applicable to the testimony of the second mate, who was examined as to all the circumstances attending the homicide, as well as to those which followed, and in many particulars his statements differed widely from the statements of the seamen previously examined; but as those discrepancies and contradictions do not give rise to any legal question, they will not be specified. One part of his testimony, however, is material in this investigation, and that part only will be particularly stated. Speaking of the efforts to resuscitate the deceased while he lay on the deck, and before the prisoner retired from the scene, the witness says he went to the cabin to get some hartshorn, thinking that hartshorn would revive the deceased if he had any life in him; and as he went, he says, he looked into the mate's room, and said to him, "For God's sake come on deck, for I believe the captain is crazy, and is going to kill us all." This statement of the witness was made in the examination in chief, and was given as a part of the circumstances which took place while the prisoner was standing over the dead body, and before the mate came on deck, as stated by the government witnesses. Both of those witnesses were fully examined as to the

acts, conduct, and declarations of the prisoner throughout the voyage, both before and after the homicide, up to the time the ship arrived at Pernambuco, and while she remained in that port. It appeared from their testimony, as well as from the testimony of the master of the ship Andalusia, who was also examined as a witness for the defence, that the prisoner was sick at the Chincha Islands, in consequence of an injury he received in the head while on shore ; and the latter gave a particular description of the injury, and a minute statement of his acts, conduct, and declarations during his sickness. His acts, conduct, and declarations immediately after the homicide, and during the five days that elapsed before the ship arrived at Pernambuco, were also very fully narrated by the second mate, in whose charge the prisoner remained ever after he retired to the cabin on the day the homicide was committed, until he arrived in New York in the bark Emperador, about the middle of March following.

Many other witnesses were also called, and examined as to his prior and subsequent acts, conduct, and declarations when not at sea, covering nearly the whole period of his life, from early youth to the time of his arrest. The brother-in-law of the prisoner, Joseph A. Cargill, was examined upon this point, and testified to certain attacks of pain in the head which the prisoner had suffered on a voyage previous to the one during which the homicide was committed, and to his violent conduct and language during those attacks. Near the close of his examination in chief, after the witness had stated the time of his return and his arrival at the house of his father in Newcastle, in this State, he was asked by the counsel for the prisoner whether he mentioned these occurrences during the voyage to any of his family or to any of the family of the prisoner. That question was objected to by the district attorney, and ruled out by the court, upon the ground that the inquiry was irrelevant to the issue, and that it was incompetent for the prisoner to fortify his own witness by declarations made out of court, and not under oath. This ruling presents the first question to be determined at the present time. In the motion as filed in the case, it is numbered five in the list of causes assigned for a new trial ; but it is in fact the first cause of com-

plaint when considered in the order of events as they occurred at the trial. As before remarked, the question was asked in the examination in chief, and, of course, before the witness was cross-examined. No principle in the law of evidence is better settled than the one enunciated in the rule, that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. *Jackson v. Eltz*, 5 Cowen, 320; 2 Cowen & Hill's Notes, 776. When this question was asked and excluded, nothing had been given in evidence by the other side to impeach the credit of the witness, and it was for that reason that it was ruled out as incompetent and immaterial. Tested by the circumstances under which the testimony was offered, it is clear it could have had no tendency to prove the issue, and in fact and truth could have had no other effect except to fortify the credit of the witness. Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account. *Rex v. Parker*, 3 Doug. 242; *Robb v. Hackley*, 23 Wend. R. 55; *Ward v. Ward*, 8 Greenl. R. 55; 1 Greenl. Ev. 469.

It was suggested at the argument that the testimony called for by the question was offered, not to fortify the credit of the witness, but to prevent any misconstruction of his conduct arising out of the circumstance that the prisoner married his sister shortly after his return from that voyage. Admit the fact to be as stated, and it is not perceived that it changes the aspect of the question in any degree, as the difficulty still remains in all its force, that at the time the question was asked and ruled out there was nothing in the case to which the answer, whether given in the affirmative or negative, would apply as rebutting evidence. At that time the question whether the witness objected to the marriage of his sister had not been asked, and certainly it cannot be maintained that testimony merely rebutting is admissible in anticipation of the matters to be contradicted or explained. Such a rule would be a very inconvenient one, and finds no support

either in the decided cases or in the practice of the Federal courts. But suppose the answer, had it been admitted, would have been accompanied by the statement, as assumed by the counsel, that he did object to the marriage of his sister, or that he did not. Still the testimony would not have been admissible, for the plain reason that it would not have afforded any explanation of his conduct in the particular under consideration, except so far as it disclosed, either directly or indirectly, his opinion as to the sanity or insanity of the prisoner at the time the occurrences took place. Testimony in general is limited to matters of fact within the knowledge of the witness, and it is only when the subject-matter of the controversy is such as to require peculiar experience, study, or skill to understand it, that persons professionally acquainted with the trade, science, or practice are permitted to give their opinions, showing conclusively that two prerequisites are essential to the admissibility of such testimony: first, that the inquiry be one appertaining to a matter of trade, skill, or science; and secondly, that the witness called be one qualified to speak upon the subject. Tested by this rule, it is clear that the opinion of this witness was not admissible, as he was in no proper sense qualified to speak upon the subject of diseases of the mind. 1 Greenl. Ev. § 440. In every point of view, therefore, we are satisfied that this ruling was correct, and that it affords no ground whatever for a new trial.

Inquiries were made of this witness, in his examination in chief, not only as to the acts, conduct, and declarations of the prisoner during the attacks, but on other occasions throughout the voyage. It appeared from his testimony that the prisoner also had an attack of sickness while the ship lay at Acapulco, in the republic of Mexico, and particular inquiry was made of him as to the acts, conduct, and declarations of the prisoner during that attack. Among the incidents of this occasion, the witness says he saw the prisoner carried from the cabin up the companion-way to the deck by the mate, carpenter, steward, and cook, and that afterward he saw them holding him on the deck. At one time, he says the prisoner got away from them and made an attempt to jump over the rail of the vessel, when they caught him and

brought him back to the house of the ship. All these particulars, and many others of a kindred character during the voyage, were stated by the witness in his examination in chief. He was then cross-examined by the district attorney. In the course of the cross-examination, he was asked whether any difficulty occurred during the voyage between the prisoner and the mate. That question was objected to by the counsel for the prisoner, and was admitted by the court. Considered in the order of events as they occurred at the trial, this ruling constitutes the second cause of complaint. In answer to this question, the witness stated that he had heard the prisoner and the then mate have loud talk, but could not state the conversation or what it was about. Corresponding questions were then put to the witness, in answer to which he stated that the then mate left the ship at Acapulco, after she had been there about two weeks, and that he was succeeded by another, who went to Callao, and there left the ship. Some difficulty took place between him and the prisoner about bending the topsail. A third was then appointed, who was discharged shortly afterward on account of his intemperate habits. At the Chincha Islands a fourth was appointed, who continued to fill the place until the ship arrived at Hampton Roads, when he ran away. Difficulty occurred between the prisoner and the mate last appointed on two occasions. One during the passage, and the other the night before he left the ship. Various acts, conduct, and declarations of the prisoner, during those difficulties, were stated by the witness in answer to the questions propounded by the district attorney. It is insisted by the counsel for the prisoner that the question objected to should have been ruled out, and that all the testimony of this witness, so far as respects the acts, conduct, and declarations of the prisoner during these difficulties, was improperly admitted.

1. They contend that the effect of the rulings was to allow the government to establish the offence charged against the prisoner, by proving that he had committed other acts of violence of a like kind.

2. In the second place, they insist that the rulings authorized an illegal attack upon the character of the prisoner, when, in

fact and in truth, he had offered no evidence putting his character in issue.

3. And lastly, they contend that the evidence was a surprise upon the prisoner, who could not be expected to come to trial on the charge in the indictment, prepared to defend his whole life.

All the answer that need be given to the first proposition is, to state that the theory of fact on which it is based is not correct, and to refer to what has already appeared in verification of the statement. It is a mistake to suppose that the evidence in question, or any part of it, was admitted, or even offered as having any bearing whatever upon the question whether the prisoner was the guilty agent who committed the act of homicide charged in the indictment. His agency in that behalf had been admitted by his counsel in the opening of his defence, and was no longer a matter in question at the trial. In the opening of the defence his counsel stated, in effect, that they did not controvert the fact that the deceased came to his death by violence, or that the violence was committed by the hands of the prisoner ; but insisted, as before stated, that the prisoner was so far insane at the time he committed the homicide that he was not criminally responsible for the act. Much of the time occupied in the trial was spent on this new issue, very properly raised by his counsel at the opening of the defence. It was upon this ground that the trial proceeded ; and after the defence was opened, it was to this point that the efforts of counsel on both sides were directed.

On the part of the prisoner, many witnesses had been called and examined, and his acts, conduct, and declarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced into the case. His counsel, in offering his acts, conduct, and declarations, called the attention of the witnesses to such occurrences and incidents in his life and conduct as they supposed were material to support the defence set up by the prisoner. That examination extended to his mental, moral, and physical condition at many and different periods of his life, both before and after the homicide was committed. Some of the witnesses referred to particular sicknesses and incidents in the life of the prisoner, and all were

allowed to state his acts, conduct, and declarations at the particular times and in respect to the particular transactions to which their attention was directed by the examining counsel. Evidence tending to show hereditary insanity in his family had also been introduced; and, in fact and truth, the counsel had claimed and exercised the right to examine the witnesses so called upon all such occurrences, acts, and declarations in the life and conduct of the prisoner as tended to show that he was insane, or that there was any tendency, either in his mental or physical condition, to that state of mind. They accordingly selected, as was very properly admitted at the argument, the dark spots in his life, or those most peculiar and least in accordance with the ordinary conduct of men, as best suited to support the defence set up by the prisoner in this case. All of the testimony objected to, and now under consideration, was admitted in reply to that which had previously been introduced by the prisoner to support that ground of defence.

One of the suggestions at the trial in support of the objection was, that the government, in attempting to rebut the testimony offered by the prisoner on this point, should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defence. That rule would be a very convenient one if it were the sole purpose of the law to acquit the guilty by establishing this ground of defence upon a partial view of the facts; but so long as it continues to be the purpose of the law, and of those who administer it, to ascertain the truth, the limitation suggested by the counsel for the prisoner, cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange or peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape, and justice often be defeated, because the means of ascertaining the truth are excluded from the jury. Persons accused of crime

have a right to set up this defence, and when proved according to the rules of law, to the satisfaction of the jury, upon a view of all the facts, it is a legal and just defence. Beyond doubt the precise question to be tried in all such cases is, whether the accused was insane at the very time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation. Proof of hereditary insanity is therefore admissible as affording some ground of presumption that the alleged diseased state of mind may have descended through those from whom the accused derived his existence. *Regina v. Tucket*, 1 Cox, C. C. 193; *Regina v. Oxford*, 9 C. & P. 525.

Evidence of acts, conduct, and declarations, both before and after the time of committing the act, tending to show an insane state of mind are also admissible, as having some bearing upon the exact point in controversy. *Lake v. The People*, 1 Park C. C. 556; *Peasly v. Robins*, 3 Met. 164; *Grant v. Thompson*, 4 Conn. 203; 1 Ben. & H. Leading Crim. Cases, 104. On the trial of this indictment that rule was observed, and every proper latitude was allowed to the counsel to show the acts, conduct, and declarations of the prisoner, both before and after the homicide was committed; and it is but just to say that the right was exercised to its fullest extent. Whenever that right is exercised in behalf of the accused, it follows, as a necessary consequence of the rule conferring the right, and as a material and essential part of the rule itself, that the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane, and to rebut the evidence introduced for the defence. To that extent, at least, the rule of law is clear and undeniable, and to that extent only was it allowed in this case under the ruling of the court. Another suggestion of the counsel for the prisoner, however, deserves to be considered before leaving this branch of the case. They contend, that proof of other acts, conduct, and declarations, though within the period of time covered by the inquiry in behalf of the accused, cannot be regarded as rebutting testimony, unless it be first shown that

the accused, at the time to which the inquiries for the government refer, was of sound mind and memory. To admit the proposition as stated would be to exclude the evidence in all cases; as the question of sanity or insanity is for the jury, and their opinion cannot be taken during the progress of the trial. All the cases herein cited to the point show that such evidence, tending to prove an insane state of mind, is admissible for the prisoner; and by the same rule of law, and for the same reasons, evidence tending to show that he was sane within the period opened for examination is admissible for the government to rebut the evidence previously introduced for the accused. For these reasons we are of the opinion that the proposition cannot be sustained.

Enough has already been said in this case to show that the second objection to the admissibility of the evidence under consideration cannot be maintained. Like the preceding proposition, its great and controlling error consists in the theory of fact on which it is based, as will presently more fully appear. Beyond question, every person accused of crime is presumed to be innocent until he is proved to be guilty; and no circumstance at the trial, except evidence of his good character previously introduced by the accused himself, can justify the court in allowing the government to introduce evidence to show that his character is bad. Such evidence is never admitted until the accused has first put his character in issue, or, in other words, has laid the foundation for its introduction by offering evidence to show that he is of good character; and then the counter-proof is properly admitted as rebutting testimony. These principles are elementary, and perfectly familiar to any one at all acquainted with the criminal law; and they are principles of very great moment to the accused, and as such ought always to be respected, strictly observed and enforced, and constantly applied. No such testimony was admitted in this case, and, what is more, none such was offered by the government. All the evidence under consideration appertained to the acts, conduct, and declarations of the prisoner in his intercourse, as master of the vessel, with those under his command, and was admitted as re-

butting testimony, in order that the jury might have the appropriate means legitimately before them of comparing the prisoner with himself, and thus be enabled understandingly to determine the question in controversy, whether the prisoner was sane or insane at the time he committed the act of homicide charged in the indictment. Unless it be assumed that evidence pertinent to the issue, and essential to the inquiry, may constitute an attack upon the character of one on trial, there is no foundation to support the argument, that the testimony under consideration should be viewed in that light; always bearing in mind that the subject-matter of the inquiry, to which the testimony is applied, was not whether the prisoner committed the act of homicide, but whether he was sane or insane at the time it was committed. Failure to discriminate in this behalf lies at the foundation of a large portion of the error plainly discoverable in the argument for the prisoner.

Two or three observations as to the third proposition will be sufficient, as it was much less relied on at the argument upon the motion for new trial than in the discussion which took place at the bar when the objection was made. Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the court for a postponement of the trial to a future day in the term, or for a continuance. Such motions are addressed to the discretion of the court, and, whether granted or refused, are not the proper subjects of exception or error. It is not, however, in that sense that the objection in this case is urged, as no such motion was made, and of course there can be no complaint that it was not granted. In this case the objection is pressed rather as an argument to show that the evidence was not admissible, and as that point has already been considered and determined, further discussion of the subject is unnecessary.

Additional testimony was then introduced. Experts were called and examined upon the subject of insanity, and they were allowed to give their opinions in answer to such hypo-

thetical questions pertinent to the case on trial, as the counsel thought proper to propound. Rebutting testimony was then introduced by the government. One Joshua R. Trevet was called and examined. In answer to preliminary inquiries, he stated that he resided in Wiscasset, in this State; that he was acquainted with the prisoner, and sailed with him in the year 1855 in the ship Ontario, which was commanded by the prisoner during the voyage. He also testified that a man by the name of Furlong was a seaman on board the ship. At that stage of the examination he was asked by the district attorney to state what occurred during this voyage between the prisoner and that seaman. To that question the counsel for the prisoner objected; but the court ruled that it was admissible, and the witness answered, giving a very full account of certain difficulties that occurred in August, 1855, on the morning after he arrived at Trapani, in Italy. All the acts, conduct, and declarations of the prisoner during this occurrence were fully stated by the witness. Much discussion took place at the trial upon the objection made by the prisoner's counsel, but the testimony was ruled to be admissible, upon the same ground and for the same reasons previously given, when the objection was made to the question propounded to his brother-in-law in the cross-examination respecting the events of the succeeding voyage. Both rulings present the same question and involve the same legal considerations; and we are satisfied they were correct, for the reasons already given, which need not be repeated. When a person accused of crime relies upon his prior and subsequent acts, conduct, and declarations to show that he was insane at the time he committed the act charged against him, and actually offers them in evidence to establish that defence, we entertain no doubt that it is competent for the government to introduce other acts, conduct, and declarations of the accused, within the same period, to rebut that presumption, and to show that he was sane. Were it otherwise, it is not perceived how this class of legal investigations can be satisfactorily conducted, as jurors, if the proposition assumed by the counsel for the prisoner be correct, must always be compelled in cases like the present

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to decide the question of sanity or insanity upon a partial view of the facts, and may often be deprived of the means of ascertaining the truth. Courts of justice have established the principle that such evidence is admissible for the accused, whenever he sees fit to offer it, and so long as that rule continues in force it must of necessity be competent for the government to introduce countervailing proof.

One other objection only remains to be considered, in connection with the rulings of the court at the trial. That question arises out of the testimony of Daniel Randal, who was called and examined by the government. He stated that he had a conversation with the second mate on the day before the witness went before the grand jury; that he asked him in his shop, whether he thought the prisoner was crazy when the affair occurred on board the *Therese*, and that the second mate replied that the prisoner was no more crazy than he was. This testimony was admitted without objection, and the witness, after the examination was closed, passed off the stand. Another witness was then called, and upon being examined upon the same subject without objection, gave a similar answer. After his examination had been completed and he had left the stand, a third witness was called by the government, and the question asked to the effect whether he had heard the mate say anything upon that subject. This last question was seasonably objected to by the counsel for the prisoner, and was ruled out by the court upon the ground and for the reason that the mate, in his examination in chief, had not testified to anything connected with the circumstances of the homicide before the prisoner left the deck, which the testimony offered was suited either to rebut or explain. Whereupon the counsel for the prisoner moved the court to strike out the testimony introduced to contradict the second mate, upon the ground that it was not admissible, and had been improperly received. That motion the court refused to grant; and the refusal of the court in that behalf constitutes the basis of the fifth, sixth, and seventh causes assigned for a new trial.

Two objections were taken by the counsel at the argument

to the ruling of the court, in refusing to strike out the testimony. They contend, in the first place, that the testimony had been improperly received, because the foundation for its admission had not been laid in the cross-examination of the second mate. When the second mate was cross-examined, the district attorney did not inquire of him whether he had ever made such a statement to either of the witnesses. That objection goes to the right of making the inquiry, and not to the competency of the testimony; and if the objection had been seasonably made, the question could not have been put. But it was not made until the question was put and answered without objection, and therefore the testimony was legally in the case, if it was competent and relevant to the issue. As a general rule it is not to be expected that the court will interfere *mero motu* to exclude testimony, otherwise competent, merely because the preliminary inquiry has not been made, unless the question is objected to on that ground by the other side; and if not objected to, and the testimony is received, it is not then competent for the court to strike it out if it is legal in form and pertinent to the issue. In the State courts the rule, that the preliminary inquiry in such cases must first be made, is never enforced, and if testimony is admitted without objection on that ground, in the Federal courts, it would not be competent for the court afterward to strike it out merely on that account.

More importance is attached to the second objection, and it deserves to be more carefully considered. In the second place, it is insisted that the testimony of these witnesses was not admissible, because it had no tendency to contradict or rebut any statement made by the second mate. This denial makes it again necessary to refer to his testimony, in order that the exact state of the case may be seen and understood. In relating the circumstances attending the homicide, he testified that he looked into the mate's room and said to him, "For God's sake, come on deck, for I believe the captain is crazy, and is going to kill us all." This statement had been given by the second mate, in his examination in chief, as a part of the *res gestæ*,

and as such was clearly admissible, as substantive testimony. Neither its admissibility nor its importance to the prisoner can be denied. As a general rule, the opinions of witnesses not qualified to speak as experts are not admissible, but it will sometimes happen, as in this case, that their opinions are so connected with the *res gestæ*, and so interwoven therewith, that they inseparably become a part thereof, and in such cases they are legal testimony, as much as any other part of the transaction ; and whenever that is the case, they become as much the subject of contradiction as any other legal and competent testimony, and may be rebutted or explained in the same way. Decided cases have established the rule that, whenever the circumstances of the case are such as to allow evidence of opinions to be received, the opposite party, after laying the foundation, may call other witnesses and prove, for the purpose of contradicting the witness whose opinion has been introduced, that he has expressed an inconsistent opinion out of court. 1 Greenl. Ev. § 449, and cases cited. That principle is applicable to this case, notwithstanding the preliminary inquiry had been omitted in the cross-examination of the second mate, as the questions to the witnesses called to rebut his testimony were allowed to be put, and the testimony in question was received without objection. For all purposes connected with the defence of the prisoner, on the ground assumed by the counsel, the opinion of the second mate had been given in evidence in his examination in chief, and none the less effectually, because it had been recited by him among the circumstances attending the act of homicide. That opinion being thus in the case, it was certainly a proper subject of contradiction ; so that the only remaining question on this branch of the case is, whether the evidence in question was of a rebutting character. Rebutting evidence is that which is given by a party in a cause to explain, repel, contradict, or disprove the facts given in evidence by the other side. Directness, in the technical sense, is not essential to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testi-

mony offered should have a tendency to explain, repel, counter-act, or disprove the opposite statement, in order to render it admissible. Its weight and sufficiency, as in other cases, are for the consideration of the jury. Applying these principles to the matter in question, it is so obvious that the testimony under consideration had a tendency to rebut the prior statement of the second mate, that further discussion of the question is, we think, unnecessary.

All of the questions presented in the causes assigned for a new trial, so far as respects the rulings of the court, having been determined, we will now proceed to the consideration of those arising out of the instructions of the court to the jury. Periodical mania was the form of mental disease set up in this case, and relied on in the defence to excuse the prisoner from the charge against him in the indictment. It was agreed by the experts that the evidence in the case tending to show that the disease was occasioned by any delusion was very slight. One of them testified that the indications of delusion in this case were very few, and added that he was not sure that the prisoner labored under any delusion. Another testified, that he did not see any indications of delusion, regarding delusion in its strictest sense. Such of the instructions only as are material to questions raised by the motion for new trial will be reproduced. In effect, the jury were told, that if they came to the conclusion that the government had not made out the whole charge, as laid in the indictment, beyond a reasonable doubt, it would be their duty to find that the prisoner was not guilty. On the contrary, if they found from the evidence that the whole charge was proved beyond a reasonable doubt, provided the prisoner, at the time he committed the homicide, was in a state of mind to be criminally responsible for his acts, that then they would turn their attention to the principal ground of defence, and in that view of the case they were instructed that, in legal contemplation, every person on trial under a criminal charge was presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, unless the contrary was proved to the satisfaction of the jury; and that to establish a defence on the ground of insanity, it

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must be clearly proved to the satisfaction of the jury, that the party accused, at the time of committing the act, was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong. They were also instructed that a person was not to be excused from responsibility if he had, at the time he committed the act, capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, a knowledge and consciousness that the act he was then doing was wrong and criminal, and would subject him to punishment; that in order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others and others stand to him, and that the act he was doing was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. In the same connection, immediately following, the jury were also instructed, that although the person was laboring under partial insanity, if he still understood the nature and character of the act and its consequences, and had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment, such partial insanity was not sufficient to exempt him from criminal responsibility. This last instruction, upon the subject of partial insanity, is the one to which exception is taken in the eighth cause assigned for a new trial. Upon this subject two things are certain: first, that the instructions are drawn in strict accordance with the settled law in this court; and, secondly, that the law of this court is the same as the law of England, and in those States in this country whose judicial decisions are entitled to the most respect. Reference is made, in support of the first remark, to the case of *United States v. McGlue*, 1 Cur. 8, decided by Mr. Justice Curtis in 1851. In that case, the learned judge said that the law supplied a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong as to the particular act with which the

accused is charged. If he understands the nature of his act, if he knows his act is criminal, and that if he does it he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from criminal responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible. Some of the cases will now be referred to which substantiate the second remark. They are as follows: *Case of McNaughten*, 10 Cl. & Fin. 210, and 1 C. & K. 130; *Regina v. Oxford*, 9 C. & P. 525; *Rex v. Offord*, 5 C. & P. 168; 1 Russ. on Crimes, 13 (ed. 1853); Rose, Crim. Ev. 953.

Suggestions were made at the argument, that the rule in the State courts of this country is different. Our examination of the subject has brought us to a different conclusion. To the extent that our researches have been prosecuted, we find that the great majority of the well-considered cases decided in the law tribunals of the States conform in principle, and in some instances in the exact language employed, to the rule laid down in the first case cited from the English reports. As examples, we refer to the case of *Freeman v. The People*, 4 Den. 28; and to the case of *Commonwealth v. Rogers*, 7 Met. 501. In the former case, Beardsley, J., speaking for the whole court, said, where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases, the jury should be instructed that it must be clearly proved that, at the time of committing the act, the party was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. Shaw, Ch. J., in the latter case said, in the very language employed in this instruction, that, although a person accused of crime may be laboring under

partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. Many other cases of like import might be added to the list of citations, but we think it unnecessary, as those already given are sufficient to demonstrate the proposition, that the English and American rules, in the particular under consideration, are the same. This question is concisely but satisfactorily considered by Mr. Wharton, in his valuable treatise upon the criminal law, wherein he remarks to the effect that the courts of this country have not hesitated to apply the rule, that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong; and it is very doubtful whether our language affords the means of stating the proposition in a more satisfactory manner. Those who may desire to examine the cases more fully will find them collected by that learned author under the title appropriately designated as the one where the accused is incapable of distinguishing right from wrong, in reference to the particular act. Whar. Crim. Law, § 16, notes *b*, *c*, *d*.

All of the well-considered cases since 1843, in both countries, are founded upon the doctrine laid down by the fourteen judges, in the opinion delivered in the House of Lords at that time. In the debate upon the question, Lord Brougham said, if the perpetrator knew what he was doing, — if he had taken the precaution to accomplish his purpose, — if he knew, at the time of doing the desperate act, that it was forbidden by the law, that was his test of sanity, and he cared not what judge had given another test, he should go to his grave in the belief that it was the real, sound, and consistent test. 1 Ben. & H. Lead. Crim. Cas. 94; *Regina v. Vaughan*, 1 Cox, C. C. 80; *Regina v. Layton*, 4 Cox,

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C. C. 149; *Regina v. Barton*, 3 Cox, C. C. 275. This last case is more particularly applicable to another branch of the present inquiry, arising out of the complaint, that the court omitted to instruct the jury in accordance with the views presented in the opening of the defence, and as enforced in the closing argument. In that case, the defence set up was, that the prisoner had committed the crime under an irresistible impulse. Parke, Baron, told the jury that there was but one question for their consideration, and that was, whether, at the time the prisoner inflicted the wounds that caused the death, he was in a state of mind to be made responsible for the crime. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. In the course of his remarks to the jury he expressed his decided concurrence in the view of the question previously taken by Baron Rolfe, that the excuse of an irresistible impulse, coexisting with the full possession of the reasoning powers, if allowed to be a sufficient defence, might be urged in justification of every crime known to the law; for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. That distinguished judge then went on to say, that something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of knowledge that he was doing wrong. *Regina v. Stokes*, 3 C. & K. 185; *Regina v. Allnut*, and *Regina v. Pate*, 1 Ben. & H. Lead. Crim. Cases, 95, 96. Other cases to the same effect might be cited, but we think it unnecessary, as it was admitted at the argument that the two first named are regarded as sound law in the courts of the country where the decisions were made. Such undoubtedly is the fact, and in our view of the matter there is nothing in the opinion of the court in the case of *Commonwealth v. Rogers* inconsistent with that state of the law. On the contrary, we think it is to the same effect,

when the different paragraphs of the opinion are carefully compared with each other. In the first place, the learned judge lays down the doctrine that a person accused of crime is not to be excused from responsibility, if he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, which is the rule, as before remarked, in all the well-considered cases upon the subject. He then stated the rule by which the jury were to be governed in case they found from the evidence that the accused was laboring under partial insanity.

That rule, it will be observed, is in the exact language of the instruction in this case, and was adopted by this court at the trial, for the reason that it was believed to be correct, and we are still of the same opinion. It does not authorize a jury to convict a person accused of crime, if laboring under partial insanity, unless they find, from the evidence, that the accused, at the time he committed the act, still understood the nature and character of the act he was doing; that he still had a knowledge that the act was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment; and we hold, that when a man has capacity and reason sufficient to understand the nature and character of his act and its consequences, and knows that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, he is so far sane as to be responsible for his criminal acts; and on that state of facts, and when all those things concur, — which was the state of the case supposed in the instruction, — the law assumes that he has the power to refrain from doing the act, and does not acknowledge the doctrine that he may be impelled to commit it by any uncontrollable or irresistible impulse. Every person, on trial, under a criminal charge, is presumed to be sane and to possess a sufficient degree of reason to be responsible for his criminal acts, unless, as before remarked, the contrary is proved to the satisfaction of the jury; and whenever partial insanity is set up as an excuse for crime,

the question, whether the degree of insanity is sufficient to constitute a valid defence, is for the consideration of the jury, whose province it is to determine the question, in view of all the evidence in the case ; and if it appears from the evidence that the mind of the accused is merely clouded and weakened, but is not incapable of remembering, reasoning, and judging between right and wrong, in respect to his own particular act, that he still understands the nature and character of the act and its consequences and has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, then the law, on that state of facts, properly regards the accused as a moral agent responsible for his criminal acts and punishable for the crime charged against him ; and to admit, in such a case, that the defence may be successfully set up that he was impelled to the commission of the act charged by any uncontrollable or irresistible impulse would be to overlook and disregard the test or criterion of responsibility for criminal acts which the law itself establishes in such a case, and to allow that defence to be urged in justification of every crime known to the law. For these reasons we are of the opinion that the instruction was correct, and that no further instruction in the case upon this subject was necessary.

A few remarks in relation to the twelfth cause assigned for a new trial will be sufficient to show that it is entirely without merit. It assumes that the court, in effect, instructed the jury that they could not acquit the prisoner on the ground of insanity, unless it appeared that his reason and mental powers were, at the time of the act, either so deficient that he had no will, no conscience or controlling mental power, or, that through the overwhelming violence of mental disease, his intellectual powers were for the time obliterated. Such portions of the charge as are supposed to be referred to in the motion for a new trial will furnish the most satisfactory answer to this ground of complaint. Upon this subject, the jury were told, in the first place, that insane delusion may and sometimes does exist to so high a degree that the person under its influence has neither intelligence nor ca-

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capacity to have a criminal intent, but that such extreme cases were easily distinguishable from the examples of partial insanity, where the mind of the person is merely clouded and weakened, but is not incapable of remembering, reasoning, and judging, at the time, between right and wrong, in respect to his own particular acts. Another remark of the court in this connection was to the effect that extreme cases of insane delusion had doubtless occurred, where the reason and mental powers of the person were for the time wholly obliterated, so that he had no will, no conscience or controlling mental power, and consequently could not be regarded, in legal contemplation, as a moral agent, and that such persons would not be responsible for criminal acts. They were also told, upon the same subject, that if the testimony of the experts was correct, that form of insanity could not be successfully set up by the prisoner, as they appeared to negative that theory of his defence; but still, it was for them to determine whether there was any sufficient evidence in the case to support that view of the defence. Towards the close of the charge these propositions, together with some others of like importance, were re-stated to the jury in a more distinct form, in order to guard their minds against the danger of any mistake. They were then told, that if they found that the prisoner did not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, then he was clearly entitled to an acquittal.

With the same view they were also told, that a person was not criminally responsible if, at the time he committed the act, he had not sufficient capacity and reason to know whether his act was right or wrong, or, to speak more accurately, to know that the act he was doing was wrong and criminal, and would subject him to punishment; and also, that he was not responsible, if the act was actually done under a fixed insane delusion that certain facts existed which were wholly imaginary, but which, if true, would have constituted a good defence; and finally, that he was not responsible if he had not intelligence and capacity enough to have a criminal intent, or if his reason and mental powers were, at that time, either so deficient that he had no will, no conscience,

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or controlling mental power, or, if through the overwhelming violence of mental disease, his intellectual power was for the time obliterated. Comment upon this part of the charge is unnecessary. It gives its own construction, and, as we think, affords a demonstration that the theory assumed in the motion for a new trial is erroneous.

All of the questions have been attentively considered, and, after full deliberation, we have come to the conclusion that it is our duty to overrule the motion; and there must be judgment on the verdict.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1858.

HENRY MELLUS *v.* JOSEPH P. THOMPSON *et als.*

When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, without being replied to by the complainant, all the facts therein alleged, which are well pleaded, must be considered as admitted, for the purpose of determining whether the plea constitutes a sufficient answer to the suit.

An executor or administrator, deriving his authority solely from one State, cannot sue or be sued in his official character in another State for assets lawfully received by him in the jurisdiction where he was appointed.

The thirty-first section of the act of Congress of the 24th of September, 1789, confers no jurisdiction upon this court of a bill of revivor against the administrator with the will annexed, of the deceased respondent in the original suit, said administrator having been appointed by a probate court in California.

Clark *v.* Mathewson, 12 Pet. 170, reviewed and construed not to assert a doctrine contrary to this.

THIS was a bill of revivor, in which it was alleged that, at the May term of this court, in the year 1853, the complainant exhibited his bill of complaint against one William D. M. Howard of San Francisco, in the State of California (since deceased), praying that certain conveyances from him, the complainant, to said Howard, and certain settlements between them, might be set aside, and the said Howard might be decreed to account to the

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complainant and settle with him, as partner in the firm of Mellus and Howard, and Mellus, Howard, and Company, and for other purposes and interests as were in the bill of complaint more fully set forth. The bill of revivor further alleged that the same Howard, having been fully served with process, appeared and answered to the original bill, and filed the general application, and proofs were also taken. In January, 1856, the respondent, Howard, deceased. The bill further set forth that the deceased left a last will and testament; and that letters of administration, with the will annexed, were duly granted to the respondents in this case, and that they had taken upon themselves the trust. Service of the bill of revivor was only made upon one of the respondents, which one appeared and pleaded, denying the jurisdiction of the court, and alleging that the decedent at the time of his death was a citizen and resident in the State of California, and that his last will and testament was duly proved and allowed by the Court of Probate for the county of San Francisco in that State, by which court also the respondent was appointed as one of the executors, but that he never was appointed an executor of the said will, or an administrator upon the estate of the deceased by any court of probate or any other court in the State of Massachusetts. The respondent also alleged that at the time service was made upon him he was casually in the State of Massachusetts for a temporary purpose, and that he then had no assets of the estate of the deceased in his possession or under his control. None of the facts alleged in the plea were in any manner controverted by the complainant.

R. Choate and Bell, for complainant.

F. C. Loring, for respondent.

CLIFFORD, J. When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, as in this case, without being replied to by the complainant, all the facts therein alleged which are well pleaded must be considered as admitted for the purpose of determining the question whether the plea constitutes a sufficient answer to the suit. Accordingly the complainant insists, notwithstanding the present respondent is not a citizen of, or resident in, this State, and was never appointed ex-

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ecutor of the last will and testament of the decedent by the State courts of this district, that he is entitled to revive the suit against him by virtue of his appointment as such executor by the Court of Probate for the county of San Francisco in the State of California, where he was domiciliated at the time of his appointment. All of the transactions for which relief is sought took place in California, and all of the assets belonging to the estate of the decedent are in that jurisdiction. Certain rules and principles respecting the rights and powers of executors and administrators appear to be so fully settled that they ought not to be regarded as the proper subjects of dispute. One is, that an executor or administrator, deriving his authority solely from another State, is not liable to be sued in his official character in this State for assets lawfully received by him in the jurisdiction where he was appointed, under and in virtue of the original letters of administration. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and it is well settled that it does not extend to other political jurisdictions. As matter of right it cannot confer any authority to collect by suit the assets of the deceased in another State; and whatever operation is allowed beyond the jurisdiction of the State where it is granted is mere matter of comity, which every other State is at liberty to accord or withhold, according to the policy of its own laws and with reference to the interests of its own citizens. *Vaughan v. Northup*, 15 Pet. 1; *Bond v. Graham*, 1 Hare, Ch. R. 482; *Spratt v. Harris*, 4 Hagg. Ecc. R. 405; *Price v. Duhurst*, 4 My. & Cr. 76; *Whyte v. Rose*, 3 Ad. & E. 507, 42 Eng. C. L. 842. Executors and administrators are bound in general to account exclusively for all the assets they receive, under and in virtue of their administration, to the proper tribunals of the government from which they derive their authority; and it was expressly determined by the Supreme Court, in the case of *Vaughan v. Northup*, that the tribunals of other States have no right to interfere with the assets which come to their possession in the jurisdiction where they are appointed, or to control their application. Repeated decisions have affirmed the principle that

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no suit can be maintained by or against an executor or administrator, in his official capacity, in the courts of any other State except that from which he derived his authority, in virtue of the probate and letters testamentary or the letters of administration there granted to him. *Fenwick v. Sears*, 1 Cran. 259; *Dixon's Exrs. v. Ramsey's Exrs.*, 3 Cran. 319; *Kerr v. Moon*, 9 Whea. 565; *Armstrong v. Lear*, 12 Whea. 169. Some attempts have been made by courts of justice in one or two jurisdictions to limit and qualify the general rule laid down in the earlier cases, but without success, as appears from numerous decisions both in this country and in England; and it may now be regarded as the established doctrine, that an executor or administrator appointed in one State cannot sue or be sued in his official character for any debts due to or from the estate under his administration in any other State, unless he is first appointed as such administrator or executor in the State where the suit is brought. These principles, so far as respects the maintaining of an original suit are not controverted by the counsel for the complainant, and they have been so repeatedly affirmed by courts of the highest respectability, that it seems unnecessary to multiply authorities upon the subject. That letters testamentary or of administration granted abroad, without new probate authority, give no right to sue or be sued, is a principle almost universally acknowledged by courts of justice. It was so held in *Carther v. Crosts*, Godb. 33, decided in 1585, and since that period has been the received doctrine in most jurisdictions to the present time. *Tourlon v. Flower*, 3 P. W. 366; 2 Kent's Com. (9th ed.) 563 and note c; *Hutchins v. State Bank*, 13 Met. 421; Story, Confl. L. § 513; *Tyler v. Bell*, 2 My. & Cr. 110; *Whyte v. Rose*, 3 Ad. & E. N. S. 507, 43 Eng. C. L. 842. But attention is drawn to the thirty-first section of the act of Congress of the 24th of September, 1789, and it is insisted, that the original suit in this case may be revived against the present respondent, within the principles of that provision. It provides, that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was

plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Further provision is also made, in case such executor or administrator shall refuse to become a party to the suit, that the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. At common law, the death of either party before judgment in real and personal actions abated the writ; and it was held by the Supreme Court, in *Green v. Watkins*, 6 Whea. 260, that the provision contained in that section was necessary to enable the action to be prosecuted against the representatives of the deceased party in cases where the cause of action survived. In the case of *Macker's Heirs v. Thomas*, 7 Whea. 530, the same court held, that this provision was clearly confined to personal actions, assigning as the reason for the conclusion, that the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee. Neither of those cases precisely touches the question under consideration, for the reason that the abatement of a suit in equity by the death of a party, in cases where the cause of action survives, does not amount to an unconditional determination of the suit. Unlike the abatement of a suit at common law, the death of one of the parties to a bill in equity, before a final decree, only has the effect in general to suspend the proceeding in the suit, but does not operate to extinguish the right of further prosecution, provided the proper representatives of the deceased party seasonably appear and prosecute the same by bill of revivor. Bills of revivor, strictly so called, lie only against the persons who are the proper representatives of the deceased party. If the suit has respect to the personal assets only of the deceased party, his executor or administrator is the proper person by or against whom the bill

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of revivor should be brought ; but if the suit has respect to the real estate of the deceased, and the cause of action survives, then the heirs of the deceased party are the proper persons to institute and prosecute the bill of revivor. Story, Eq. Plea. (6th ed.) § 54. Applying these principles to the present case, there would be no difficulty in sustaining the views of the complainant, but for the fact that the respondent in the bill of revivor has never been appointed an executor of the last will and testament of the decedent by the tribunals of Massachusetts. His appointment, as the plea shows, emanated from the Court of Probate for the county of San Francisco in the State of California ; and if it be true, as was expressly held by the Supreme Court in *Vaughan v. Northup et al.*, 15 Pet. 5, that the grant of administration upon the estate of a deceased person is strictly confined in its authority and operations to the limits of the territory of the government which grants it, then it follows, as it would seem, that the appointment of the respondent as executor by the tribunals of the State of California cannot have the effect to confer upon him that character in the courts of another State. Federal laws do not make provision for the appointment of executors or administrators. They only recognize the existence of such appointments under the local law. Executors and administrators are recognized in the thirty-first section of the Judiciary Act now under consideration, but they are such as have received their appointments, not from Federal authority, but from the tribunals of the State where the suit was pending at the time the abatement took place. Accordingly it was held by the Supreme Court, in *Aspden et al. v. Nixon et al.*, 4 How. 497, that executors and administrators appointed in one State cannot be known in another State as the representatives of the estate of a deceased person, for the purpose of prosecuting or defending a pending suit. This principle was subsequently affirmed by the same court in the case of *Stacy v. Thrasher*, 6 How. 58, in still more decisive language. Mr. J. Grier said, in the case last named, that an administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encum-

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bered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He therefore cannot do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it, and the courts of another State will not acknowledge him as a representative of the deceased, or notice his letters of administration. *Borden v. Borden*, 5 Mass. 67; *Pond v. Makepeace*, 2 Met. 114; *Chapman v. Fish*, 6 Hill, 554. Similar views were also held by the same court in *Hill v. Tucker*, 13 How. 467, in which the preceding cases were cited and approved. Nevertheless, circuit courts have jurisdiction of suits by or against executors or administrators, if they are citizens of different States, in certain cases where they are the real parties in interest before the court, and have succeeded, by virtue of their appointment, to all the rights and interests of their testators or intestates, as in suits upon promissory notes given by the deceased in certain special cases, or in bills of equity for an account. *Chappedelaine v. Dechenaux*, 4 Cran. 306; *Childres v. Emory*, 8 Whea. 669. Both of those suits, however, were commenced in the district constituted within the limits of the political jurisdiction or State from which the defendants derived their authority. Civil suits may be brought against persons in their individual capacity, either in the district whereof they are inhabitants or in which they shall be found at the time of serving the writ. 1 Stat. at Large, p. 79. That provision, so far as the latter clause of it is concerned, does not apply to executors and administrators, for the reason that their authority is limited by the territory of the State from which it is derived; and it has been expressly held by the Supreme Court, in repeated instances, that they cannot be sued in any district out of the State from which their authority proceeds. It was so distinctly held in *Vaughan v. Northup et al.*, 15 Pet. 1; and such, as before remarked, is the settled law, both in this country and in England. *Fenwick v. Sears*, 1 Cran. 259; *Dixon's Exrs. v.*

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Ramsey's Exrs., 3 Cran. 319; *Kerr v. Moon*, 9 Whea. 565; *Apsden et al. v. Nixon et al.*, 4 How. 497; *Stacy v. Thrasher*, 6 How. 58; *Hill v. Tucker*, 13 How. 467. But reliance is placed upon the case of *Clark v. Mathewson et al.*, 12 Pet. 170, as asserting a different doctrine. On a careful examination of the facts of that case, it does not appear to warrant any such conclusion. It was a bill in equity, brought by a citizen of the State of Connecticut against a citizen of the State of Rhode Island, for an account of certain transactions set forth in the bill, with a prayer for general relief. After the cause was at issue, it was by the agreement of the parties ordered by the court to be referred to a master to take an account, and pending the proceedings before the master the complainant died. Administration upon his estate was taken out by one John H. Clark, in the State of Rhode Island. By the laws of the State, no person not a resident thereof can take out letters of administration; and such administration is indispensable to the prosecution or defence of any suit in the State, in right of the estate of the intestate. Clark filed a bill of revivor in the Circuit Court of Rhode Island against the defendants in the original suit, in which he alleged that they were citizens of that State; and he also alleged himself to be a citizen of the same State, and administrator of the intestate. Judge Story dismissed the bill of revivor, on the ground that it was a suit between citizens of the same State. Whereupon the complainant appealed to the Supreme Court, where the decree of the Circuit Court was reversed, with the concurrence of the circuit judge; and it was held that the bill of revivor was a mere continuance of the original suit, and that, inasmuch as the parties to the original bill were citizens of different States, the jurisdiction of the court completely attached to the controversy, and could not be divested by the fact that the administrator of the complainant subsequently appointed was a citizen of the same State with the respondents. That principle is entirely consistent with the determination previously made, that the removal of the original plaintiff, after the commencement of the suit, into the same State with the respondent, does not divest the jurisdiction of the

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court, if they were citizens of different States at the time the suit was commenced. *Morgan's Heirs v. Morgan*, 2 Whea. 290; *Mollan v. Torrance*, 9 Whea. 537; *Dunn v. Clarke*, 8 Pet. 1. Besides, it will be perceived that the suit in that case was revived in a Circuit Court constituted and having jurisdiction in the State from which the administrator derived his authority; and consequently the decision of the court is perfectly consistent with all the previous and subsequent adjudications upon the subject. It was objected in that case, that the jurisdiction could not be sustained, because the complainant and respondent in the bill of revivor were citizens of the same State; but the Supreme Court held that Congress, in the provision of the Judiciary Act under consideration, treated the revivor of the suit by or against the representatives of the deceased as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belonged to the same State where the cause was depending, or to another State. This last remark was made by the court, in answer to the objection that both parties in the bill of revivor belonged to the same State, and without any reference whatever to the question, whether an executor or administrator appointed only by the Probate Court of another State could be made a party to such a proceeding without a new appointment. For these reasons I am of the opinion that the case of *Clark v. Mathewson et al.* does not touch the question under consideration. Such being the fact, the proceeding stands without any authority to support it, and must be determined upon general principles. All of the reasons assigned in the adjudged cases to show that an executor or administrator cannot be made an original defendant in a State other than the one from which he derives his authority apply with equal force against making him a respondent to a suit in equity abated by the death of his testator or intestate. He has no official existence in such other State, and possesses no power there which he can exercise in his official character. Decided cases have established the doctrine, that the authority granted to him is strictly confined to the limits of the State from which it was derived; and if so, then it would seem to follow that any

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other person might be made a party defendant to the bill of revivor with equal propriety, and for the reason that, while here, in a jurisdiction where his authority is not acknowledged, he is not in any legal sense the representative of the estate of his testator. He cannot be liable *de bonis propriis*, and as there are no assets in this jurisdiction, there can be nothing on which a judgment would operate. Relief is prayed, not only for the payment of money, but that conveyances of real estate situated in California may be set aside, and that the same real estate may be conveyed to the complainant. Whether executors, as such, have authority, under the laws of California, to convey real estate does not appear, and is at least very doubtful. But if it were less so, it is difficult to see by what warrant this court can recognize the respondent as the executor of the last will and testament of the decedent, while it appears that he is not such by the local law of the district in which the suit is pending, and that there are no assets of the estate within this jurisdiction. Counsel would hardly contend that a bill of revivor could be maintained against an executor or administrator appointed in England, without new probate of the letters testamentary, or new letters of administration in the State tribunals of the district where the original suit was brought. Nothing is better settled than the rule, that a person claiming under a will proved in one State cannot intermeddle with or sue for the effects of a testator in another State, unless the will be first proved in that other State, or unless he be permitted so to do by some law of that State authorizing such a proceeding. He cannot sue for the personal estate of the testator out of the jurisdiction of the power by which the letters of administration were granted, and upon the same principle and for the same reason he cannot be sued or compelled to defend a suit in any jurisdiction to which his authority as executor does not extend. *Doe v. McFarland*, 9 Cran. 151; *Kerr v. Moon*, 9 Whea. 571. Devisees or heirs would not be bound by the decree, if one were made, so far as the real estate is concerned, for the reason that they are not made parties to the bill of revivor, and have had no notice of the proceeding. It is obvious, therefore, if the court should render a decree that the complainant is enti-

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bled to the relief prayed for, the respondent in the bill of revivor would have no authority to comply with the order of the court, and the court would have no power to enforce its mandate. In view of all the circumstances disclosed in the case, I am of the opinion that the plea to the jurisdiction of the court is sufficient, and that the demurrer must be overruled.

CORNELIUS DONAHOE *et al.*, Libellants, *v.* JOHN B. KETTELL *et al.*

By the terms of a charter-party, the owners engaged that the vessel during the voyage should be kept sea-worthy, and should be furnished with necessary men and provisions, and that the whole of the vessel under the deck, with the exception of the cabin, accommodations for the men, and storage of sails and provisions, should be at the sole use and disposal of the charterers during the voyage. *Held*, that the instrument was a contract of affreightment, and not a demise of the vessel.

When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board; and in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the owners of the vessel; and the latter, consequently, cannot be made responsible for the loss of the goods shipped on board, or for injury to the same under such contracts. But when the charter-party operates merely as a contract between the charterer and the ship-owner for the conveyance, by the latter, of goods and merchandise to be shipped on board by the charterer, the owners of the vessel are the carriers of the goods, and will in general be responsible to the charterer for the non-conveyance of them, according to their contract.

Where the language of a contract is plain and clear, it must be understood that the parties mean what they have plainly expressed; but if, from a view of the whole instrument, the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it should appear to be inconsistent with such particular part, because the construction of the contract ought not to depend upon any formal arrangement of words, but should be collected from every part of the same as applied to the subject-matter to which it relates.

In this case the vessel was chartered for a voyage from Boston to Port au Prince, and back to Boston, — the charterer agreeing to pay a round sum for the voyage, all foreign port charges, pilotage, and lighterage, and to advance at the outward port only what the master might require for the disbursements of the vessel, not to exceed one half the charter. These advances having been made, and the voyage not completed, no proportionate part of the charter money was due the owners, or could be received by them from the charterers.

THIS was an admiralty appeal. The respondents chartered the brig *Erie*, at Boston, for a voyage to Port au Prince and

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back to Boston. By the terms of the charter-party, the whole of the vessel under the deck, with exception of the cabin, and necessary room for the crew, and storage of the sails, cables, and provisions, was to be at the disposal of the respondents, and no merchandise was to be laden on board except for them; they were to pay eighteen hundred dollars for the charter, as well as all foreign port charges, pilotage, and lighterage, and agreed to advance the master what money he might require to disburse his vessel at Port au Prince, not to exceed half the charter.

The owners covenanted to keep the vessel staunch, well fitted, tackled, manned, and provisioned for the voyage. Stipulations were also inserted in the charter-party, allowing a certain number of running lay-days, for discharging and loading the vessel at the outward port, and reasonable time for the same purpose at Boston, and also providing that the respondents should pay a specified demurrage in case the detention of the vessel should happen through their default or that of their agent.

The brig sailed from Boston on the 25th of October, 1856, arrived at Port au Prince, safely delivered her outward cargo, and took in full cargo for return, but on the homeward voyage was totally lost by a peril of the sea. A libel *in personam* was filed by the owners in the District Court to recover the stipulated sum for the hire of the vessel. A decree was entered in favor of the libellants for the sum of nine hundred and eight dollars and eighty-four cents damages, with costs of suit.

William Brigham, for appellants.

The contract is not a letting of the ship, but a contract of affreightment. This is evident from the whole contract. The vessel was under the control of the owners, who appointed the master and crew, and only the parts of the vessel destined for the taking of freight were under the control of respondents. They were required to load within a limited time. The contract provides for a round sum for freight; the only question, therefore, is, whether the contract was entire or divisible.

The language of the charter-party indicates but one voyage, viz. "from Boston to Port au Prince and back to Boston."

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The respondents agree to pay for the voyage \$1,800, when completed, unless required to make advances to disburse the vessel at Port au Prince.

There is no case in law or admiralty which has held that a contract of this kind can be divided. *Barker v. Cheriot*, 2 Johns. 352; *Pennoyer et al. v. Hallet*, 15 Johns. 332; *Blanchard v. Bucknam*, 3 Greenl. 1; *Hamilton v. Warfield*, 2 Gill & Johns. 336; *Towle v. Kettell*, 5 Cush. 18.

There is good reason for the rule. Libellants could have insured their freight, but respondents could not thus have protected themselves.

F. E. Parker, for libellants.

CLIFFORD, J. Three grounds are assumed by the counsel of the libellants in support of the claim set up in the libel. In the first place, he insists that the charter-party in this case is a letting of the vessel, and not a contract of affreightment. He contends, in the second place, that if the contract is a letting of the vessel, her loss only exempts the charterers from their obligation to return her, but not from the payment of the freight. Thirdly, it is insisted that, if the contract is one of affreightment, still the libellants can recover a proportion of the charter money for the outward voyage, on the ground that the contract is divisible both at common law and in the admiralty. All of these propositions, or certainly the first and third, are denied by the counsel of the respondents, and they present the principal matters to be determined at the present time.

Whether the charter-party in this case is a letting of the ship or a contract of affreightment must depend upon its terms and conditions. Upon that subject the rule is, as established by the supreme court, that a person may be the owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In the

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first case the general freighter is responsible for the conduct of the master and mariners during the voyage, while in the latter case that responsibility rests on the general owner. *Marcardier v. The Chesapeake Ins. Co.*, 8 Cran. 39; *Hooe v. Groverman*, 1 Cran. 214. There are two kinds of contracts, says Judge Ware, passing under the general name of charter-party, differing from each other very widely in their natures, their provisions, and in their legal effect. In one the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. Under such a letting of the ship the master is the agent of the owner, and the mariners are in his employment, and he is answerable for their conduct. By such a contract the charterer obtains no right of control over the vessel, but the owner is, in contemplation of law and in fact, the carrier of whatever goods are conveyed in the ship, for the reason that the charter-party is a mere covenant for the conveyance of the merchandise, or the performance of the service which is stipulated in it. In the other class of cases the vessel herself is let to hire, and the owner parts with the possession, command, and management of the vessel, the hirer thereby becoming the owner during the term of the contract, and, if need be, he appoints the master and mariners, and becomes responsible for their acts. *Drinkwater v. The Spartan*, Ware, 153, 1 Conkl. Adm. 178. When goods and merchandise are carried by sea from one place to another, they are usually shipped on board a vessel under a charter-party or bill of lading. A charter-party is a contract whereby the ship-owner or master covenants or agrees for the use of the ship by the charterer for a particular voyage or adventure, or for some specified period of time. Although the ship-owner expressly grants the vessel to be used by the charterer, the contract will nevertheless not amount, in general, to a demise or bailment of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew, unless from the construction of the whole instrument it appears that the owner has surrendered the possession, command, and navigation of the vessel. If the end sought to be accomplished by the charter-party can conveniently be

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accomplished without the transfer of the vessel to the charterer, courts of justice are not inclined to regard the contract as a demise of the ship, although there may be express words of grant in the formal parts of the instrument. *Christy v. Lewis*, 2 Brod. & B. 410; *Saville et al. v. Campion*, 2 B. & Al. 510; *Certain Logs of Mahogany*, 2 Sumn. 597. On the other hand, if the nature of the service, and the due attainment of the object sought to be accomplished by the charter-party, requires the vessel to be absolutely under the control, and subject to the orders and directions of the charterer, as if she is to be employed for transporting troops in time of war, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at the general disposal of the charterer to sail upon any service that he may require, courts of justice will, as a general rule, give effect to the contract as a demise of the ship. In such cases the services of the master and crew, unless others are appointed by the charterer, pass as merely accessorial to the principal subject-matter of the contract, and they attorn to it, as it were, to the charterer, and become temporarily the servants of the charterer, and as such, for the time being, are bound to obey his orders. Similar views are held by Judge Story in the case of the *Volunteer*, 1 Sumn. 566, and by Judge Betts in the *Aberfoyle Abb.*, Adm. R. 250; and such appears to be the general course of the decisions in this country. *Gracie v. Palmer*, 8 Whea. 605; *Webb et al. v. Peirce*, 15 Law Rep. 9; *Clarkson v. Edes*, 4 Cow. 470; *Taggart v. Loring*, 16 Mass. 336; *Raymond v. Tyson*, 17 How. 63; *Pickman v. Woods*, 6 Pick. 254; *Vallejo v. Wheeler*, Cowp. R. 143; *Holmes v. Pavenstedt*, 5 Sandf. 100; *Perkins v. Hill*, 2 W. & M. 162. In this case the owners did not charter the whole vessel, and they expressly stipulated with the charterers that she should be kept tight, stanch, well fitted, and provided with every requisite, and with men and provisions necessary for the voyage. They did not, therefore, part with the possession, command, or navigation of the vessel, and, without referring to any other provisions of the charter-party, suffice it to say that there can be no doubt, from the whole

tenor of the instrument, that it is a contract of affreightment, and not a demise of the vessel.

Such being the fact, it becomes unnecessary to consider the second proposition assumed by the libellants. To prevent misconstruction, however, it may not be amiss to remark, that, when a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board, and, in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the owners of the vessel ; and the latter consequently cannot be made responsible for the loss of the goods shipped on board, or for any injury to the same under such contracts. But when the charter-party operates merely as a contract between the charterer and the ship-owner for the conveyance by the latter of goods and merchandise to be shipped on board by the charterer, the owners of the vessel are the carriers of the goods, and will in general be responsible to the charterer for the non-conveyance of them according to their contract.

More reliance is placed upon the third proposition assumed by the counsel for the libellants, and it deserves to be more carefully considered. It is predicated upon the fact that the passage of the vessel out was completed, and that she was lost on her return, and affirms that by the true construction of the contract the service stipulated to be performed is divisible. Assuming that the service in the outward passage was precisely equal to what the service would have been on the return passage if the vessel had not been lost, the counsel of the libellants insist that they are entitled to recover a moiety of the round sum which the charterers stipulated to pay for the voyage from Boston to Port au Prince and back to Boston. That view of the contract was sustained in the court below, and it was solely upon that ground that the decree was made. Decisions by that learned judge are entitled to very great respect, but in this instance I have not been able to concur in the conclusion to which he came in passing the decree. Whether the contract is entire or divisi-

ble must depend upon the terms and conditions set forth in the charter-party. Parties have a right to make their own contracts, and when they are fairly made and do not contravene any positive law or rule of public policy, they must be carried into effect according to the intention of the parties, to be derived from the language employed, the surrounding circumstances, and the subject-matter. Certain rules have been established for the interpretation of contracts, which a learned commentator says are the conclusions of good sense and sound logic applied to the agreement of the parties. Their object is to ascertain with precision the mutual understanding of the contract in the given case, and, like other deductions of right reason, they have been quite uniform in every age of cultivated jurisprudence. Those rules for the construction of contracts are the same in the courts of law and of equity, and it is a great mistake to suppose that they are not equally applicable in the admiralty. *Eaton v. Lyon*, 3 Ves. Jr. R. 692; 2 Kent's Com. 756 (9th ed.); *Seddon v. Senate*, 18 East, 74. Charter-parties are frequently informal instruments, sometimes having inaccurate clauses, and on that account must have a liberal construction, such as mercantile contracts usually receive in furtherance of the real intention of the parties and the usages of trade. In the construction of such instruments, as well as other mercantile contracts, the general rule is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. *Raymond v. Tyson*, 17 How. 59; Abb. on Ship. (5th Am. ed.) 250; 3 Kent's Com. (9th ed.) 276. Where the language of a contract is plain and clear, whether it be a charter-party or other written agreement, it must be understood that parties mean what they have plainly expressed, and in such cases there is nothing left for construction. But if from a view of the whole instrument the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it may appear to be inconsistent with such particular part, for the reason that the construction of the con-

tract in the case supposed ought not to depend on any formal arrangement of the words, but should be collected from every part of the same as applied to the subject-matter to which it relates. Words are to be taken in their popular and ordinary meaning, unless some good reason appear to show that they were used in a different sense, and the whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. As a general rule, the delivery of the goods at the place of destination, according to the charter-party, is necessary to entitle the owner of the vessel to freight. Conveyance and delivery of the cargo form a condition precedent, and must be fulfilled in order to entitle the owner to freight, unless such delivery is prevented by the default of the shipper or his agent. A partial performance, says Chancellor Kent, is not sufficient, nor can a partial payment or ratable freight be claimed, except in special cases, and those cases are exceptions to the general rule, being such only as are called for by the principles of equity. 3 Kent's Com. (9th ed.) 298; *The Ship Nathaniel Hooper*, 8 Sumn. 542. Still, if the outward and homeward voyages be distinct, in a case like the present, freight is recoverable for the one though the other be not performed. But if by the terms of the contract they be one voyage, and the ship performed the outward and fails to perform the homeward voyage, no freight is recoverable. *Mackrell v. Simond et al.*, 2 Chitty, R. 666; 18 Eng. C. L. 454. Upon this subject the law is well settled, that if one entire voyage or whole service is stipulated for in the charter-party, the ship-owner cannot recover on the contract, unless the entire voyage or whole service is performed. It was so held by Parsons, Ch. J., half a century ago in *Coffin et al. v. Storer*, 5 Mass. 252; and such has been the settled law in this district from that period to the present time. In that case the ship was chartered for a voyage from Biddeford, in the State of Maine, to Surinam and a market, and back to Biddeford; and being wrecked on her homeward passage, it was held that no freight was earned under the charter-party, for the reason that the voyage was an entire voyage, and the hire was not payable until the voyage was completed. That decision was

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followed by the Supreme Court of Maine in *Blanchard v. Bucknam*, 3 Me. 1, and is still the law in the courts of that State. So in *Barker v. Cheriot*, 2 Johns. 352, where a vessel was chartered for a voyage from New York to Martinique, and back to New York, it was held that no freight was due, although the vessel delivered the outward cargo, but was captured on her voyage home. Thompson, J., said in that case, which was decided in 1807, that the rule was too well settled to admit of being questioned. *Scott v. Libby et al.*, 2 Johns. 336. Numerous decisions have been made to the same effect since the date of those last cited, and there are none to be found in the books which support the opposite view of the question. All of these cases have recently been reviewed by the Supreme Court of Massachusetts, in the case of *Towle v. Kettell et al.*, 5 Cush. 20, and that court has again affirmed the same doctrine. Most of the adjudged cases were examined by the learned judge, who gave the opinion on that occasion, and those which are now supposed by the counsel for the libellants to be inconsistent with the general doctrine upon the subject were satisfactorily explained. Those explanations will not be repeated, and under the circumstances any further reference to authorities is deemed unnecessary. In that case the charter-party was for a voyage from Boston to Wilmington, in the State of North Carolina, and from thence to Cape Haytien, in the island of Hayti, and from thence to Boston, the charterers engaging to pay to the owner for the charter or freight of the vessel during the voyage in manner following, that is to say, fifteen hundred dollars, payable so much in Hayti as the master might want for the disbursement of the vessel, together with the foreign port charges, lighterage, and pilotage, and the balance on the discharge of the cargo in Boston. After arriving at Wilmington and loading, the vessel proceeded to Hayti; and having discharged her freight there, and taken on board her return cargo, she sailed for Boston, but was lost on the return passage. On that state of facts the court held that the charter-party was for one entire voyage, and as the vessel was lost on her return home the owner was not entitled to recover for the outward freight of the vessel. At the argument in

this court it was suggested that the present case might be distinguished from the one just mentioned, on the ground that the balance of the freight in that case, beyond what was necessary for the disbursements of the vessel, was made payable at the home port. But the suggestion cannot have weight, for the reason that by necessary implication the same requirement is contained in the charter-party under consideration. Beyond question such is the legal construction of the provision upon that subject, and whatever is contained in a written agreement by necessary implication is as much a part of the instrument as if it were written out in words. Unless that distinction can be upheld, and it is clear it cannot be, it is difficult to see upon what ground it can be supposed that any exists, as in all other respects save one the two instruments are substantially alike. Some stress is laid upon the fact that the charter-party in this case contains a provision that the charterers should advance what money the master might require for the disbursements of the vessel at the outward port, not to exceed one half the charter. No such limitation was annexed to that provision of the charter-party in the other case, but the owner agreed to pay so much of the amount stipulated to be paid for the charter of the vessel as the master might want at Hayti, for such disbursements without any limitation whatever, except the necessary wants of the vessel. Whatever distinction, therefore, exists between the two cases makes against the theory of the libellants, rather than in their favor, assuming that the other case was well decided. That provision, however, in my opinion, has nothing to do with the question under consideration, as it is one usually to be found in charter-parties of every description, and is carefully limited to the amount necessary to accomplish the purpose for which it was inserted. Whether the sum paid was more or less than might have been required is immaterial in this investigation, and cannot affect the liability of the owners in this suit. They paid what was demanded of them for that purpose, and in so doing they performed that part of the contract, and that provision is fully executed. Without doing violence to the language of the charter-party, I can form no other conclusion than that the con-

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tract in this case is for a voyage from Boston to Port au Prince and back to Boston. For the charter of the vessel to make that voyage the charterers agreed to pay the round sum of eighteen hundred dollars, and all foreign port-charges, pilotage, and light-erage. By the legal construction of the contract no part of the charter money except what the master might require for the disbursements of the vessel was to be paid until the voyage was completed; and having made these advances to the master for that purpose, according to the terms of the contract, and the voyage not having been completed, there is nothing remaining due from the charterers to the owners of the vessel. For these reasons the decree of the District Court is reversed, and the libel must be dismissed with costs.

MANUEL NIETO, Libellant, v. WILLIAM R. CLARK.

Where a seaman had attempted a rape upon a female passenger in a foreign port, and the injured party refused to remain on board, and demanded the return of her passage-money unless the offender was dismissed, the master was justified in the immediate discharge of the seaman.

Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of Congress or the courts of the United States, and in such cases the burden is upon the master to show the reasons of the discharge, and to prove to the satisfaction of the court that they were just and reasonable.

The contract of all passengers entitles them to respectful treatment from those in charge of the vessel, and, in respect to female passengers, includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest approach.

ADMIRALTY appeal. On the 29th of October, 1859, the libellant shipped as steward on board the bark *Evangeline*, of which the respondent was master, for a voyage to Valparaiso and other ports in the Pacific Ocean, and back to Boston. At Valparaiso a lady engaged a passage to the United States. While the vessel was lying at Talcahuano, Chili, the libellant, in the night-time, entered the lady's state-room, attempted a rape, and behaved with indecency in the lady's presence. Upon com-

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plaint to the respondent, the libellant was immediately discharged, and put ashore. Upon a representation of the case to the American consul at Talcahuano, the respondent was advised to pay the steward his wages, and the amount was therefore tendered him, but refused. Shortly after his discharge the libellant shipped on board the Osprey and returned to Boston, when the libel was brought, claiming wages, damages, and expenses to the amount of two hundred and twenty-six dollars seventeen cents. After the answer was filed, upon motion of the libellant praying that the respondent might be directed to pay into court any sum he relied on as a tender, an equal sum to that offered at Talcahuano was paid over to the libellant. The libel was dismissed without costs, in the District Court.

F. W. Sanger, for libellant.

J. H. Prince, for respondent.

CLIFFORD, J. All the evidence of the libellant's misconduct arises from his own confession to the mate of the *Evangeline*, who accompanied him on shore at the time he was discharged. His testimony is to the effect that, while they were going on shore, he asked the libellant why he went into the state-room of the lady, and that the libellant replied that it was because he wanted to get clear of the ship. Both question and answer clearly indicate that he had full knowledge of the complaint made against him, and they also warrant the conclusion that his misconduct was well known to the crew, and that the order of the master in sending him on shore was acknowledged by himself to be just and proper. Had he been ignorant of the charge, he would have inquired what was meant by the question; and if he had been innocent of the assault upon the lady, he would have denied the accusation. Nothing of this kind was done. On the contrary, his answer is significant of the fact that he was fully apprised of the accusation as set forth in the answer, and that his misconduct was too well known to admit of concealment or denial. After his discharge, and while the *Evangeline* lay in the harbor of Talcahuano, the libellant came on board, and again stated to the mate that he was glad he was clear of the ship, and made no complaint that he had been improperly or unjustly sent

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on shore. These conversations took place about the time of his discharge or shortly after, while the recollection of the occurrence was fresh in his memory, and being unaccompanied by any protestation of innocence, or any complaint that he had been falsely accused or harshly treated, afford a very strong ground of presumption that he was entirely conscious of the truth of the charge as set forth in the answer, and that he fully acquiesced in the justice of the order of the master dismissing him from the ship on that account.

Masters cannot lawfully discharge seamen in a foreign port before the complete fulfilment of their mutual obligations, without just and valid reasons. 8 Kent's Com. (9th ed.) 253; Cur. Mer. Sea. 148; *The Exeter*, 2 Rob. Adm. 261; *Hutchinson v. Coombs*, Ware, 64. First offences, unless of an aggravated character, are not in general regarded as sufficient to justify the master in ordering a seaman to be discharged, and repentance and offer of amends, even in case of aggravated offences not amounting to a disqualification, or which do not render the delinquent unfit to be retained, ought to entitle him to a restoration to his situation. Theft, quarrelling, and disobedience of orders are the only enumerated causes in some of the Continental codes for which seamen may be discharged in a foreign port without their consent, and all appear to concur in the general doctrine, that such harsh measures cannot be justified in law, unless it be for such gross or persistent misconduct as shows that the delinquent is disqualified for his situation, or unfit on that account to be retained. Offences, such as quarrelling, or disobedience of orders, or even minor thefts, vary so much in the degree of guilt to be attached to the delinquent, as is shown from experience, that any arbitrary specification of cases has not proved to be either just or satisfactory. Consequently, no such rules have ever been acknowledged in the jurisprudence of England or of the United States. Seamen may be discharged for aggravated offences, or for such gross and persistent misconduct as shows them to be disqualified to perform the obligations of their contract. Accordingly, the laws of the United States do not assign any specific offences for which a

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seaman may in all cases be discharged, but allows the master to dismiss him, as before remarked, for offences of an aggravated character, and for such gross and persistent violation of his duty and the regulations of the ship as show that he is radically disqualified for his situation and unfit to be retained, leaving the justification of the master in all cases to depend upon the character or aggravation of the offence, and the degree and perverseness of the seaman's misconduct. Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of Congress or by the courts of the United States; and in all such cases the burden of proof is upon the master to show the reasons of the discharge, and it is incumbent upon him to prove to the satisfaction of the court that they were clearly just and reasonable. As a general rule, the marine law requires the master to receive back a seaman when he has thus discharged him, if he repents and seasonably offers to return to his duty and make satisfaction; and if the master, under such circumstances, refuses to restore him, or if the seaman has been unduly discharged, he may follow the ship and recover his wages for the voyage and the expenses of his return. Masters are made subject to fine and imprisonment, by the tenth section of the act of the 3d of March, 1825, if, without justifiable cause, they maliciously force any officer or mariner on shore when abroad, or leave him behind in any foreign port or place, or refuse to bring home those they carried out, who are in a condition and willing to return. All of these regulations are for the benefit of seamen, and were designed to prevent their discharge in foreign ports, without their consent. Notwithstanding these regulations and prohibitions, seamen may be discharged at their own request, if granted in good faith at the time the request is made. Applying these principles to the present case, it is obvious that the prayer of the libel cannot be granted.

According to the testimony, as already stated, the libellant had been guilty of a gross outrage upon a lady who had taken passage in the vessel to the United States. His misconduct is confessed, and it would seem was publicly known to those be-

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longing to the vessel. After what had occurred, it could hardly be expected that she would consent to remain on board unless the offender was discharged. To an unoffending female thus circumstanced his presence would be painful, and she might find it very inconvenient on board a merchant vessel to seclude herself at all times of the day from those parts of the vessel necessarily frequented by those in charge of the vessel. She was accompanied by her brother; and it would be unreasonable to hold that the master was obliged to allow his passengers to leave the ship, to refund their passage-money, in order to retain the libellant. Whatever loss or inconvenience he suffered, arising out of his discharge, was the direct consequence of his own misconduct towards the lady passenger, and was in no sense the result of any unjust or illegal decision of the master. Passengers are under obligation to conform to the reasonable regulations of the vessel, and to a certain extent owe obedience to the commands of the master, as the necessary consequence of the relation they bear to the ship during the voyage; and they are also entitled to respectful treatment from the master and other officers in charge of the vessel, and may well claim to be exempt from insult and personal violence from the crew. They do not contract merely for ship room and the right to personal existence, but for suitable food, comforts, and necessities, and for protection against personal rudeness from all those in charge of the vessel, and every wanton interference with their persons. *Chamberlin et al. v. Chandler*, 4 Mas. 446.

In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. An offence toward an innocent and unoffending female, such as is described in the answer, and substantially admitted in the proofs, must be considered as one of great aggravation; and, in view of the embarrassments likely to ensue from such an outrage, when committed on board a merchant vessel, in a distant sea, especially in case the injured party refuse to remain on board, unless the offender was dismissed, might well be regarded as disqualifying the libellant

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for his situation, and as rendering him unfit to be retained in his capacity as steward. It occurred in the night-time, during the absence of the master, and, in view of all the circumstances disclosed in the testimony, afforded a just and legal ground for the discharge of the libellant.

Having come to this conclusion, the result is, that the decree of the District Court must be affirmed with costs.

NEW HAMPSHIRE DISTRICT.

OCTOBER TERM, 1858.

STEPHEN K. BALDWIN v. AMOS SIBLEY AND DELANO SIBLEY.

The granting clause of a deed was in the following words : " Give, grant, bargain, and sell . . . one of Baldwin's peg-splitting machines, and the right to use the same and of vending to others to be used, in the county of Cheshire, excepting the town of Hinsdale, being the same machine for which letters-patent were issued," &c. *Held*, the deed contained no words authorizing the grantee to construct any machine whatever; that it was a conveyance of a single machine already in existence, and of the right to use and sell that single machine within the described territory.

Whenever a conveyance of a right under a patent is of a character to create an interest in the patent itself, it must be shown by an instrument in writing; while a license to make and use a machine, as it is not required to be recorded, need not be in writing; but such license conveys no interest in the patent, and no power to authorize a third person to construct the patented invention.

Consequently, oral declarations of a patentee, not made to the defendants, which, if admitted, would show an exclusive right within a described territory, in the person through whom defendants claimed to derive their right, were held inadmissible.

Evidence showing that defendants had, with the plaintiff's knowledge and without objection on his part, used their machine for a number of years, was held incompetent to establish an exclusive right in the person under whom defendants claimed to derive their right to use the machine in controversy.

Parol proof of a lost memorandum, shown by the patentee to one of the witnesses, which memorandum contained a list of the rights sold by the patentee, and enumerated among others the conveyance of the exclusive right within a specified district to the person under whom defendants claimed, was held inadmissible.

ACTION on the case for damages for an infringement of a patent right. Stephen K. Baldwin was the patentee of a ma-

chine for cutting shoe-pegs, under letters-patent dated the 16th of July, 1842. The patent was renewed on the 8th of July, 1856, and reissued in the following November. The writ contained three counts, and alleged in effect the construction and putting in practice of twenty machines which imitated the invention of the plaintiff. As to everything except the using and putting in practice of one machine, the defendants pleaded the general issue, and in respect to this one they pleaded specially that after the obtaining of the letters-patent, and before the same were renewed and reissued, their machine was constructed and assigned to them for a valuable consideration, and was put in use by them, of right, by the authority and license of the plaintiff. The jury returned a verdict for the plaintiff, and defendants moved for a new trial, alleging error in certain rulings of the court, and also upon the ground of misdirections to the jury. It appeared at the trial that the machine in controversy had been constructed by one Hollon Farr, under a parol license from one Sylvanus Bartlett; under which license Farr had sold the machine to the first-named defendant, who, with the other defendant, had put the machine into use. A deed from Stephen K. Baldwin to Sylvanus Bartlett was introduced by the defence, under which it was claimed that Bartlett had obtained the right to manufacture and sell any number of the machines within a certain specified territory. According to the language of the deed, the grantors gave, granted, bargained, and sold "unto Sylvanus Bartlett one of Baldwin's peg-splitting machines, and the right to use the same, and of vending to others to be used, in the county of Cheshire, excepting the town of Hinsdale in said county, being the same machine for which letters-patent were issued under the seal of the Patent-Office of the United States." The court, however, construed the deed to convey to the grantee but one machine, with the right to use and sell the same within the described limits, and thus instructed the jury. This ruling of the court constituted one of the grounds of the motion for a new trial. The other rulings, to which objection was taken, sufficiently appear in the opinion.

Edmund Burke, for plaintiff.

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John S. Wells and Causten Browne, for defendants.

CLIFFORD, J. It was insisted by the counsel for the defendants that the deed, when properly construed, authorized the grantee to make and use, and vend to others to be used, any number of machines he might see fit to make and sell within the territory defined and described in the deed. To that proposition it will be sufficient to say that the deed contains no words authorizing the grantee to make and construct any machine whatever. It purports to convey one of the machines, and the right to use and sell the same within the described territory, clearly leaving it to be inferred that the machine had already been constructed, and that it constituted the principal subject-matter of the contract. By the words of the deed, therefore, it is apparent that it was a conveyance, not of the right to make and construct a machine, but of the machine itself, as already constructed and in existence, and of the right to use and sell the same within the described territory. Reliance, however, is placed upon the succeeding phrase, which it becomes important to notice, as the whole instrument must be taken together in order to ascertain its true construction. All the ambiguity, if any, arises from that phrase, which is immediately connected with the one already recited, and reads as follows: "and of vending to others to be used in the county of Cheshire, excepting the town of Hinsdale in said county." Take the language as it reads, and it is too obvious to admit of a doubt that the whole paragraph is immediately connected with the word "same," which precedes it, and refers to the machine previously conveyed in the granting part of the deed; and this is made even more evident by the concluding portion of the sentence, in which the machine conveyed is described as being the machine for which the letters-patent were issued. Every one of these considerations is inconsistent with the idea that more than one machine was conveyed; and when taken together they afford a demonstration that the proposition assumed by the counsel for the defendants on this branch of the case cannot be sustained.

Second. Evidence was offered by the defendants tending to show that Sylvanus Bartlett, prior to the construction of the ma-

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chine in controversy by Farr and its sale by him to the defendant, had a license, by parol from the patentee, to make and use, and vend to others to make and use, the patented machines within the territory described in the deed. It consisted of oral declarations of the patentee made at various times before the expiration of the original term for which the patent was granted. None of these supposed declarations, however, were made to the defendants or either of them; and being objected to by the counsel for the plaintiff, they were excluded by the court. On the same point and for the same purpose, the defendants also offered to prove that they had put in practice and used their machines for ten years before the original term of the patent expired, claiming to own it, and with the knowledge of the patentee, and without objection on his part. This evidence was also objected to by the counsel for the plaintiff, as incompetent and insufficient to establish a right in Sylvanus Bartlett to authorize Farr to construct the machine in controversy and sell it to the defendants, and it was accordingly ruled out by the court. They also offered to prove on the same point, and for the same purpose, that a paper or memorandum, since lost, was given by the patentee to one of the witnesses in 1858, as and for a list of the rights which he the patentee had sold under his patent, and that the list so delivered to the witness recited that he had sold to Sylvanus Bartlett the right to make and use, and vend to others, the right to make and use the patented machines, within the county of Cheshire in this district, with the exception of the town of Hinsdale, as claimed by him in virtue of his deed. Objection was also made to this testimony by the counsel for the plaintiff, and it was excluded by the court; and these several rulings constitute the foundation of the second cause assigned for a new trial in this case. These second rulings will be considered together, as all the evidence was offered for the same purpose, as is properly stated in the motion, and the several offers of proof involved the same general considerations. It was offered to prove by parol that the patentee had conveyed the right to Sylvanus Bartlett to make and use, and vend to others, the right to make and use an indefinite number of the patented ma-

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chines within the described territory. No pretence was set up at the trial that Farr had any other right or license to make and sell the machine in controversy, except what was granted to him by Sylvanus Bartlett, or that the defendants or either of them had any right or license to put the machine in practice and use it, except what they derived by the purchase of the machine from Hollon Farr. This statement embraces a summary of the exact state of facts; and the only question is, whether the rulings of the court were correct. It is admitted by the counsel for the defendants that a patent privilege or monopoly could not be assigned at common law, except by deed, for the reason that, being a franchise and part of the royal prerogative, it could only subsist by royal grant. But it is insisted that the rule is otherwise in this country; and within certain limits and subject to certain qualifications, the argument appears to be just, and may well be admitted. By the eleventh section of the Patent Act of the 4th of July, 1836, it is provided that every patent shall be assignable in law either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof. Whenever a patent is renewed and extended by the commissioner of patents, it is provided by the eighteenth section of the same act that the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. These two provisions beyond question are in *pari materia*, and so far as they relate to the same subject must be construed together. Most of the questions arising upon their construction, which were originally supposed to be involved in any obscurity, have been settled by the decisions of the courts; and in respect to some others which have not been so determined, the language of the respective provisions is too plain and unambiguous to admit of any serious doubt. As a general rule, an assignment of an interest in a patent

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must be in writing, for the reason that such transactions are required to be recorded, and in fact and reality are not authorized to be made in any other way. *Gayler et al. v. Wilder*, 10 How. 493. Licenses to make and use the machine for the purposes for which it is constructed, when derived from the patentee, or from one holding a territorial right by virtue of a valid conveyance from him, are not required to be recorded, and consequently need not be in writing. Contracts not required by law to be in writing may be proved by parol evidence; and therefore a mere license to make and use the thing patented, when derived from an authorized source, may be proved in that way. Difficulties sometimes arise in determining whether, by the terms of the contract, the right conveyed in any given case amounts to an interest in the patent or is only a license to make and use the thing patented, within the principles just stated; but it seems to be well settled, that, wherever the contract is of a character to create an interest in the patent itself, it must be shown by an instrument in writing, which indeed is clearly to be implied from the very definition of assignment as generally understood in its application to patent rights. It is a grant in writing of the whole or a part of the exclusive right vested in the patentee by the letters-patent; and it makes no difference whether such part be designated as an undivided part of the whole patent, or as the grant of the exclusive right of the patentee within a particular district; for in either case it is a conveyance of an interest in the patent, and as such must be in writing, and is required to be recorded. *Cur. on Pat.* pp. 233, 234 (ed. 1849). When the patentee sells to another a patented machine made by himself, or permits such other person to make the machine, the party thus authorized becomes a licensee, with the right of using and selling the machine; but he has no interest in the patent, and it is well settled that he cannot, by virtue of such a contract, authorize a third person to make the machine. All the cases agree that every grant which embraces any portion of the exclusive right under the patent is an assignment, and there can be no doubt that every such assignment must be in writing; and if so, it cannot be proved by parol evidence. Other tests have been

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suggested by which to determine whether a particular instrument amounts to an assignment, or only to a license ; and, accordingly, it has been held that an authority conferred upon a party to make or construct the thing patented, without mentioning his assigns, is nothing more than the grant of a power or the dispensation with a right or remedy which confers only a personal right upon the licensee, and is not transmissible to any other person. Several decisions have been made upon this subject, to which it may be useful to refer as the means of elucidating the particular question involved in this branch of the motion now under consideration. Where a patentee undertook, by deed under seal, to grant, bargain, sell, convey, assign, and transfer to another, his executors, administrators, and assigns, the right and privilege of making, using, and selling the thing patented, stipulating that the grantee should have the right and privilege of manufacturing the same to the extent that six persons could accomplish the object, with the right to vend the manufactured article in any part of the United States, it was held that this was a license or authority from the patentee, and need not be recorded. *Brooks v. Byam et als.*, 2 Story, 525. One of the reasons assigned for holding that it was a license, and that it did not create an interest in the patent, was that the exercise of the right granted was not limited to any particular locality, and the same learned judge held that the right so granted was as entirely incapable of being apportioned or divided among different persons, and therefore that an assignment, by such grantee, of a right to another to make as many of the manufactured articles as one person could prepare was void. On the other hand, it was held by the Supreme Court, in *Wilson v. Rousseau et al.*, 4 How. 686, that an assignee of the exclusive right to use two machines within a particular district can maintain an action for an infringement of the patent within that district even against the patentee, and the same court affirmed the principle in *Woodworth et al. v. Wilson et al.*, 4 How. 716, which was decided at the same term. At the trial it was understood by the court in this case that the evidence was offered by the counsel of the defendants to set up an exclusive right within the described

territory ; and it is proper to say that, if such was not the intention of the counsel at the time, he failed to make himself understood by the court. Whether so or not, however, it can make no difference in the determination of the questions presented in the motion for a new trial, as, in any point of view which can be taken of the case, the evidence was not admissible. If it was offered to set up an exclusive right in Sylvanus Bartlett, then it was inadmissible ; because it was an offer to prove an assignment of an interest in the patent, which, to be valid and obligatory, must be in writing, and cannot be evidenced by parol testimony ; and if it was offered to set up a mere license in the supposed grantee, then the right so conferred was a mere personal right in the licensee, which could not be transmitted to Hollon Farr. *Gayler et al. v. Wilder*, 10 How. 492. Such, however, was not the nature of the right set up, as clearly appears from the offers of proof and from the course of the trial. Those offers were not made until the legal effect of the deed had been ruled by the court, and the parol testimony was offered as a substitute for the authority, which, it was insisted by the counsel for the defendants, might well be derived from the terms of the deed ; and no doubt is entertained that the evidence offered, if admissible, would establish an exclusive right in Sylvanus Bartlett to make and use the machines, and vend the right to make and use the same to others. One thing, however, is certain, and that is, that the defendants either set up an exclusive right in Sylvanus Bartlett, or they did not. If they did, then the right could not be established by parol testimony ; and if they did not, but merely set up a license in him to make and use the patented machine, then he could not assign that right in any way to another ; so that, in either point of view, this cause for a new trial is destitute of any proper legal foundation.

Third. From the course of the argument it may be inferred that very little reliance comparatively is placed upon the third cause assigned for a new trial ; and, considering the nature of the action, the character of the testimony, and the state of the record, it cannot be necessary to give it any extended examination. Suffice it to say, that, in view of the pleadings and of the well-known rule of

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law that all are principles in tort, it cannot be sustained. Accordingly the motion for new trial is overruled, and there must be judgment on the verdict.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1858.

GEORGE J. FOSTER, IN EQUITY, *v.* WILLIAM W. GODDARD.

Under a written contract to pay one tenth of the net profits after deducting expenses "that may appertain to the goods themselves," the expenses of clerk-hire, advertising, and taxes were properly deducted from the gross amount.

Under this contract the respondent, who had the exclusive control of the accounts of the business, refused to receive a sum less than he considered due from a debtor of the concern, after the claim was barred by the statute of limitations, declined to allow the complainant to receive his proportion of the sum offered, and withheld from him the means of adjusting such proportion. Held, that respondent must account for complainant's proportion of the sum thus offered.

Where, by the terms of a contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit to be charged or credited in the general account, held, that respondent should account to the complainant for the profits made by him on the sale of a vessel built expressly for the business, though never used in it, but sold for a large profit soon after being launched.

When the agreement under which a vessel was employed expired two months before her return, and while she was at sea, held, that her value must be computed, in determining the respective shares of the parties to the agreement, at what she was worth at the time of arrival, and not at the date of the expiration of the agreement, such appearing to be the intention of the parties, and that the burden was on the party contracting to pay a certain proportion of the value, to show that she was worth less at the time of her arrival than she was actually sold for two months after.

At the expiration of an agreement, by its own limitation, claims to a large amount arising from transactions under the agreement were still outstanding and uncollected. The respondent, one of the parties to the agreement, claimed that the master, in making up the account under it, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and that henceforth they were to be regarded as his property, and at his risk. Held, that the master properly declined to adopt this theory, and justly allowed the complainant his portion of the profits made after the agreement expired.

. THIS was a bill in equity praying for an account of all the dealings between the parties, under two agreements, dated June

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24, 1843, and May 7, 1849, respectively. The first agreement was set forth in the bill as follows: —

This memorandum of an agreement entered into this 24th of June, 1843, by and between William W. Goddard, on the one part, and George J. Foster, on the other part, witnesseth:

That said Foster engages to proceed at once in the ship Robin Hood direct to Valparaiso, and that he will there remain for the term of five years, and devote himself for the whole time exclusively to the management of said Goddard's business, such as the sale and purchase of cargoes, collecting freight moneys, procuring return freights, eliciting orders for the purchase and shipment of goods for the Coast, effecting the sale of vessels, when wished, and collecting and forwarding all the information that may be obtained respecting the trade. In fine, to transact any and all business that may be required of him by said Goddard, in strict accordance with his instructions, whose interest he is to care for and protect from frauds, impositions, false and unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability; he is also to give to each vessel the greatest possible despatch that may be consistent with the owner's interest.

In consideration of which, said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one tenth of the net profits of his business in that trade, after deducting interest at the rate of six per cent per annum on the capital invested, and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, and keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum. And, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. The vessels now designed for the trade are the ship Robin Hood and bark

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Roscius, and are valued, the Robin Hood, at ten thousand five hundred dollars, cash, at the completion of her last voyage; and the Roscius, at eight thousand dollars, cash, on the completion of her present voyage. It is also understood that said Foster's interest of one tenth is liable to the full extent for all the risks and casualties in the business attendant upon the goods and vessels.

It is furthermore agreed that said Foster shall be entitled to a compensation of one thousand dollars per annum, in lieu of his share of the profits, should it fall short of that amount; it is understood, however, that this is not in addition to his share of the profits, and that the profits of the business are not to be abstracted until the expiration of the five years agreed upon.

Said Foster is also hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and replace them with others, should he find it expedient so to do.

In witness whereof we have hereunto set our hands and seals.

Under this agreement the complainant alleged that he proceeded to Valparaiso, where he continued to reside during the time limited therein, and well and truly performed all things in said agreement provided to be done by him. The general mode of conducting the business was by adventures and shipments of merchandise, procured at Boston by defendant, and consigned to complainant, by whom the merchandise was sold, and the proceeds invested in other merchandise which was consigned to defendant, who sold the return cargoes; by whom, also, books and vouchers were kept, showing the exact profit and loss on each adventure. At the time limited for the existence of said agreement there was due the complainant, and in the hands of the respondent, as alleged in the bill, a large sum, which, for the accommodation of the respondent, was allowed to remain in his hands, without the rendition of any account. The second agreement entered into between the parties was set forth as follows:—

This memorandum of an agreement entered into this 7th

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of May, 1849, by and between William W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth :

That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such as sale and purchase of merchandise and any other property, collecting freight moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade ; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability.

In consideration for which, said Goddard engages that said Foster shall on his return be entitled to one fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting interest on the capital furnished by said Goddard, as also all costs and expenses of whatever nature that may be incurred both at home and abroad in prosecuting the business, including the expense of sailing and keeping in repair the vessels employed, together with the port charges, as also the cost of said Foster's living, which is not to exceed one thousand dollars per annum ; and, furthermore, said Goddard has the right of purchasing, chartering, freighting, and selling the vessels designed for the trade at his option, the profit or loss attendant thereon to be charged or credited in general account. The vessels now designed for the trade are the ships Crusader and Harriet Erving, which are to be charged in account, the former at the value that may be agreed upon between William W. Goddard and Samuel Goddard, in settlement of their account ; and the latter, at the cost of construction and equipment when new, abating nothing for the use of the ship for her present and first voyage.

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It is understood that said Foster is to leave in hands of said Goddard, bearing interest, what funds he may have, — less two thousand dollars, to be paid him before leaving this country, — and that neither the same nor any portion of his profits shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time, by giving said Goddard so much notice, that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood, that said Goddard has the right to annul this agreement whenever he may choose to do so; and, furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon. Said Foster is hereby authorized to call to account, and to displace, any and all masters of vessels that may be sent out by said Goddard, and to replace them with others, should he find it expedient so to do.

Under this second agreement the complainant proceeded to the west coast of South America, and there conducted the portion of the copartnership business provided for him to do, until the 31st of September, 1850, when he terminated the agreement in the manner therein provided. The business under this contract was conducted in the manner similar to that under the first, the accounts and vouchers being in the hands of the respondent, who had been, by the complainant, repeatedly requested to effect an adjustment, and furnish the complainant an account of the profits of the business. The cause was referred to a master, to take an account of the dealings and transactions of the parties under the agreements, and to state balances. After the reference to the master, the complainant, by leave of court, filed an amendment to the bill, and the respondent filed his answer to the same. An order was also passed by the court, that the amendments to the pleadings should be submitted to the master to whom the cause had been previously referred, to state the accounts with the same powers, and in as full and perfect a manner as if the

amendment had been introduced prior to the first order of reference.

The material portions of the master's report were as follows : —

The first disputed item is a claim made by the complainant to a share in the profits realized by the respondent upon a sale of the ship *Valdivia*.

This was a new ship, built under a contract made by the respondent, and she was launched on the 15th of October, 1846, and was sold by the respondent to the United States government the 7th of December, 1846, at a profit. The validity of this claim depends upon the construction to be given to the particular stipulations upon the subject in the first agreement.

She was never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for, built, and designed for this trade ; that the respondent had engaged a part of her outward cargo ; that these facts were communicated by him to the complainant ; and that, under instructions from him, the complainant had procured a portion of her first return cargo. But she was sold before any cargo had been laden on board of her at Boston.

It is contended by respondent, that complainant is only entitled to a share of the profits of such vessels as were actually employed in the trade, and not of those which might have been designed for the business, but not actually employed in it ; that, although the respondent may have intended the *Valdivia* for this trade, yet he abandoned that intention before carrying it into effect, and that the agreement of June 24, 1843, did not restrict him from pursuing business on his private account.

The language of this contract is, that the respondent may purchase, sell, or charter any vessel *designed* for this trade, and any profit or loss attendant upon such purchase, sale, or charter is to be credited or charged in the general account. If the respondent purchased or sold any vessel designed for this trade, an interest was expressly given to the complainant in the results of that

transaction. Whatever was designated for use and sale, and set apart, became a part of the common stock.

That this language was here used in its natural and obvious sense will appear from a reference to the succeeding provision in the agreement, viz. : —

“The vessels *now designed* for the trade are the ship Robin Hood and bark Roscius, and are valued, the Robin Hood at \$10,500 cash, at the completion of her last voyage, and the Roscius at \$8,000 cash, on the completion of her present voyage.”

At this time, the Roscius, so far from being actually employed in the joint business, was then absent upon a different voyage. She was, however, agreed upon and designated for this trade, and her value was fixed upon the completion of her then present voyage.

It seems to me, therefore, upon every view of this contract, that the construction for which the respondent contends that the complainant had an interest only in the vessels *actually employed* cannot be maintained.

Crusader's Second Voyage. — Complainant claimed, in the next place, that he should be credited with a share of the profits of the Crusader's second voyage.

His engagement was for the term of five years after his arrival in Valparaiso, which expired October 3, 1848; he was to receive one tenth of the profits of the business for the same period, or the sum of \$5,000, at his election. He in fact remained in Valparaiso until November 30 or December 1, 1848, employed, as he claims, in the business of the respondent.

The agreement was for a fixed and definite period, and it makes no provision for compensatory services rendered after its expiration. If the complainant rendered any services after October 3, 1848, he did not render them under this agreement, for it expired by an express limitation at that date.

It seems to me, therefore, that he cannot claim *by virtue of this agreement* an interest in a voyage which was not completed until more than three months after October 3, 1848, as compensation for any services rendered by him after that date.

It was competent, however, for these parties to make an addi-

tional agreement covering a period not embraced within the original contract, and the evidence clearly shows that they have so done.

It must be conceded that the respondent had no right to call upon the complainant for his services for a single day beyond October 3, much less for a period of two months; neither is it very probable that the latter would have gratuitously rendered such services.

Upon this point, I find, as matter of fact, that the respondent did request and did receive of the complainant the benefit of his services after October 3, 1848, and particularly in reference to the second voyage of the *Crusader*, upon the agreement, if not express, yet clearly implied and well understood, that the latter was to share in the profits of this voyage.

It was competent for the parties to make an *additional agreement*, and they have done so; but I cannot acquiesce in the suggestion of complainant's counsel, that it was competent for the parties subsequently to agree that a certain voyage begun before the agreement ended should be deemed to be within the original contract, which would not have been otherwise embraced in its terms, — thus giving to the contract a construction and effect which by law it would not have.

The Amount to be credited for the Sale of the Charlotte. — The *Charlotte* was sold by the respondent, in February, 1849, for the sum of \$23,000. In the first account filed by him in this case, he credited the business with that sum, and charged commissions on that sum for effecting the sale.

The respondent now asks to reduce that credit to the sum of \$16,000, which he alleges was the true value of the vessel on October 3, 1848, and alleges that the complainant is only entitled to a credit of her value upon that day, when the agreement of 1843 expired.

On October 3, 1848, the *Charlotte* was upon her fourth voyage, having left Valparaiso, September 9, and arriving in Boston, December 5, 1848.

In the accounts filed by the respondent in this case, he has credited the complainant with a share (one tenth) of the profits

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of this voyage. It has thus been treated by the respondent as embraced within the agreement, although the voyage did not terminate until December 5, 1848. I can draw no other inference, from the fact that the respondent himself has thus credited the profits of this voyage, than that, by common consent, this voyage was taken and agreed to be within the first agreement.

On the 3d of October the Charlotte was at sea, engaged in this voyage for the common benefit, and her service was not ended until December. And therefore, until the completion of that voyage thus prosecuted for the joint benefit, she was by the express terms of the agreement at the joint risk. From this consideration it seems to me clear that the period for her valuation must be deemed to have been postponed until the termination of this voyage.

The Charlotte arrived the 5th, and was probably discharged about the 20th, of December. According to the testimony the demand for California vessels began in December, 1848, and the witness advertised one about the 10th of December. The Charlotte was sold in February, 1849. There is no evidence before me that her value on December 5th or 20th was not about the same as in the succeeding February. Respondent credited the amount received on the sale in February, and charged commissions thereon. I am of the opinion, therefore, that no sufficient reason has been shown for disregarding the credit originally given for the sale of the Charlotte, and that this item must stand as originally credited in the first account filed by the respondent.

New England Worsted Company's Account. — The respondent in his account has charged the general account with a balance due from the New England Worsted Company, under date February 28, 1848, \$ 2,173.04.

The complainant objects to this item, and claims that there should be deducted from it the sum of \$ 1,789.89, which, as he avers, the New England Worsted Company were willing to pay, and which the respondent was bound to receive.

The facts proved are as follows :—

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The company were charged, on the books of the respondent with the sum of \$ 2,173.04 on the balance of an account due for wool; but the amount due was in dispute between them. In 1850 or 1851, the company tendered in payment about \$ 1,500, which he declined to receive. Nothing further was done by either party, until January, 1857, after the claim had been outlawed three years, when the company offered the sum of \$ 1,789.89, but the respondent refused to receive it, and also declined to permit the complainant to receive his proportion of that sum.

It is contended by the respondent that he had a right to conduct his own business, in his own way, being responsible only for a want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed; and that, if any loss has thereby occurred, it is properly chargeable to the business.

The management of the business, including the collection of the accounts, was under his absolute control; and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept a sum less than what he believed to be due; and if he had instituted a suit to recover the full amount, the complainant would undoubtedly have been bound by the result. But was he at liberty to do neither?

Moreover, in January, 1857, when the New England Worsted Company offered to pay the sum of \$ 1,789.89, Goddard had no legal claim whatever upon them; for he had already allowed his right to recover the original demand, or any sum, to be barred by the statute of limitations for three years. If under these circumstances he chose to decline the sum of \$ 1,789.89, he voluntarily subjected himself to the loss; but he could not in good faith compel the complainant, against his expostulations, to share it with him. In my opinion, therefore, the sum of \$ 1,789.89 should be deducted from the item in dispute.

Rent, Taxes, Clerk Hire, &c. — The respondent has charged in his account, under both agreements, certain items for store rent, taxes, clerk hire, and advertising, paid by him, as he claims, on account of the joint business, and which should be allowed.

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The complainant disputes these charges ; and the first question is, whether they are to be considered in ascertaining the complainant's share of the profits.

How far these charges are maintainable under the first agreement, I have found to be a question of difficulty in view of the provision upon that subject.

By the terms of the contract the parties have, as it seems to me, expressly provided that, so far as the complainant's share is concerned, the profits are to be ascertained by deducting —

1st. The interest on the capital invested (not the interest and taxes) ;

2d. All costs and expenses of sailing, victualling, manning, or repairing the vessels employed, including port charges ;

3d. The actual expenses that may appertain to the goods themselves ;

4th. The cost of the complainant's living, not exceeding \$ 600 per annum ; and that no expense which does not belong to one or the other of these clauses can be included.

Under this view, I incline to the opinion and do report that the charges for clerk hire, for taxes on the capital employed, and for advertising the business generally, ought not to be allowed.

As to store rent, so far as the store was 'procured or occupied for the storage of the goods, the charge is proper, but beyond this it must be disallowed.

Third Voyage of the Harriet Erving. — It is said by the respondent that the sales of this cargo were not completed until long after January 1, 1851 ; that they were made by Alsop & Co. after the complainant became a member of that firm ; that one of its articles was, that no partner should be interested in any other business ; and that he as such partner received his share of the commissions upon these identical sales. It is argued that the complainant never had any interest in this voyage, or, if he had, that he forfeited the same, because he was entitled only to a share of the profits of such business as *he* should conduct to completion. These suggestions deserved, and I have endeavored to give them, the most careful consideration. The duties which the complainant was to perform are stated in the agreement with considerable particularity.

According to the arranged course of business, the merchandise shipped by the respondent to Valparaiso for sale was placed in the house of Alsop & Co., who made the sales upon a guaranty commission, with the assistance and under the general control of the complainant, who acted under instructions from the respondent. It thus appears, that, while aiding in the sales of the outward cargoes formed a material, it by no means constituted the main part of the duties devolving upon the complainant under the agreement.

The evidence very fully shows that it was not the habit nor according to the intention of these parties to force immediate sales of the entire cargoes, either by auction or otherwise. So that, although the larger portion of each cargo was generally disposed of within a few months—often a few days—after its arrival, yet in most, if not in all cases, some portion of it remained undisposed of for one, two, or even three years. It must, therefore, have been perfectly well understood by them, that, whenever this agreement should be terminated, more or less would remain to be done in disposing of the outward cargoes.

Respondent, in his letter of March 18, 1846, wrote thus: "Do not, however, suffer our goods to be forced upon people at a sacrifice. My object is to supply the market at the highest point, and deeply mortified should I be to learn that another had afterwards obtained better prices." The business seems to have been conducted subsequently in accordance with these instructions. Whether the respondent, under any circumstances, after the termination of the agreement upon notice, could have required the complainant to remain in Valparaiso and devote himself, to the exclusion of all other business, for one, two, or more years, as the case might be, in disposing of the residue of cargoes, at such prices as the former might prescribe, upon pain of forfeiting all his interest in such cargoes, may admit of grave doubt. He might, perhaps, reasonably have required that he should have the benefit of the complainant's services in substantially disposing of any such residues, and that the latter should not engage in any other business which would conflict with his duty in this respect. Complainant was indeed bound

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to conduct to completion the business of this voyage, by superintending the sale of the cargo; but, their relations having terminated in all other respects, it is difficult to perceive why that duty might not have been fully performed by him, in letter and spirit, although he had become, without the assent of the respondent, a member of the house of Alsop & Co., or of some other firm. What remained for him to do under this agreement was this: to aid and superintend Alsop & Co. in effecting sale of the residue of the cargo. What the respondent had a right to require was, that he should perform this service faithfully, and that he should enter into no engagements that would be inconsistent with its performance; and therefore it is, that I do not perceive why the circumstance of his joining a mercantile house, after the termination of his agreement, although before the last cargo was entirely disposed of, would necessarily involve a violation of his agreement, or a forfeiture of his rights.

If the respondent could have exacted more than this, it certainly was not practically necessary for the protection of his interest, and it is not strange that he should have waived it. That he did waive any such right, if it existed, is, I think, clearly proved.

Upon the 13th of April, 1850, the third voyage of the Harriet Erving had been projected, and the respondent must have known then, as well as in June, July, and August, during which months the evidence shows much correspondence relating to this voyage, that, according to all former experience, some portion of her outward cargo would remain to be sold after December 31, 1850.

Knowing this, on the 13th of April, in reply to the complainant's letter of February 22, announcing his intention to terminate the agreement, January 1, 1851, and then to join the house of Alsop & Co., he not only assented to this course but warmly approved of it. It was after this expression of assent that the voyage in question was undertaken, and that most of the services in reference to it were rendered.

Let it be observed that under the agreement of 1849, then subsisting, the complainant could be called upon to transact no business of which he was not to share the profits. He was

called upon by the respondent to transact this business, and he did it. I think that the cordial assent which the latter gave on April 13th to Foster's joining the house of Alsop & Co., January 1, 1851, fairly carried with it an assent that he might, after becoming a member of that firm, complete what would remain to be done under this voyage. It is now too late for him to object, especially as, after giving that assent, he required and accepted the services of the complainant as to this voyage, — services which he was not bound to render, and which the respondent could not require, except upon agreement that he was to share in the profits. The argument pressed against the complainant's right to share in the profits of the Harriet Erving applies as well to every preceding voyage, for the sales of none of them were completed on January 1, 1851, when he joined the house of Alsop & Co. But the same answer applies to all: either, 1st, That, after the termination of the agreement by notice, the complainant was at liberty to engage in other business, provided that he, at the same time, faithfully performed what remained for him to do in completing the sale of the residues of cargoes; or, 2d, If the agreement authorized the respondent to require of the complainant that he should abstain from all other business until the sales of all residues of cargoes were absolutely completed, yet that he waived this harsh and oppressive privilege, and consented to his joining the house of Alsop & Co.

As to the suggestion that the complainant, after becoming a member of the firm of Alsop & Co., was not at liberty to engage in other business, that would seem to be a matter between him and his partners, rather than between him and the respondent; but a complete answer to it, as well as a sufficient reason for the respondent's ready assent to the arrangement, are found in the previous connection that had existed between all these parties in this business, and in the fact that, in effecting the best sales possible of this cargo, their interests were identical.

Mode of making up the Accounts, &c. — The respondent claims that the accounts are to be made up as cash on the 3d of October, 1848, the day when the first agreement terminated, and on the 1st of April, 1850, or the 1st of January, 1851, ac-

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ording as it may be determined upon which of said days the second contract terminated.

Accordingly, to accomplish this, in crediting the account with the outstanding claims due under the two contracts, but running to maturity, he proposes to deduct the amount of discount necessary to make them equivalent to cash on the 3d of October, 1848, and April 1, 1850, or January 1, 1851, as the case may be, and then to charge the amount with interest ever afterwards on such discount, as if the cash had actually been paid by him. No such discounting of the claims for cash actually occurred.

In my opinion this is not the proper mode of making up the accounts, for two reasons.

1st. The contracts do not provide for this mode of accounting and settlement, but, as it seems to me, contemplate the contrary.

If the respondent may now make up the account on that theory, then certainly the complainant, on the days when these contracts severally terminated, had the right to require that the former should assume the risk that all debts due to the concern, amounting as it is said in the whole to over four hundred thousand dollars, would be paid, and he was then entitled to an absolute credit for these sums, deducting the discount. So that if every dollar had been lost or uncollectible, the complainant would still have been credited with the full amount. The propositions cannot be dissevered. If the respondent may now assume that he took this risk, then certainly Foster could have required him to take it.

But the written contracts, as well as the conduct of the parties, contradict this view.

2d. In the second place, if the respondent had the right, or was bound to assume and to give credit to the concern for all outstanding claims, as cash on the day when each contract terminated, and to settle on that basis, he did not do it, but refused so to do. He advanced no money, he discounted no credits. Having refused or neglected to come to an account, until all the claims had matured, and until the filing of this bill, I do not perceive upon what equitable or legal principle he can now

assume that he has done what he refused to do, or be entitled to any such benefit as he now claims.

The period to which the account must be made up under both contracts is the filing of the bill.

Recapitulation. — The master finds and reports that under the original and amended bill the complainant is entitled to recover : —

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 1st. The balance due him under the first and second agreements (exclusive of the second voyage of the Crusader and the third voyage of the Harriet Erving), as per item No. 1 (\$41,581.56) | \$41,581.56 |
| 2d. One tenth of the profits of the second voyage of the Crusader, as per item No. 3 (\$4,005.72) | 4,005.72 |
| 3d. One fourth of the profits of the third voyage of the Harriet Erving, as per item No. 2 (\$21,943.15) | 21,943.15 |

To which the respondent alleged the following exceptions : —

First Exception. — For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent, carried on by him under the contract dated June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business, for clerk hire, taxes, and advertising, to wit, thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business.

Second Exception. — For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England Worsted Company, for which they have not paid, but refuse to pay.

Third Exception. — For that the said master has allowed to

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the complainant, under the contract of June 24, 1843, one tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia, which vessel was not employed in, or put into, the business of this respondent, carried on under the contract aforesaid.

Fourth Exception. — For that the said master, in taking an account of the business of this respondent to which the contract of June 24, 1843, refers, has fixed the value of a vessel called the Charlotte as it was at a period of time some six months subsequent to the expiration of the five years mentioned in the contract of June 24, 1843, whereas it should have been fixed at its value at the time of the expiration of said five years.

Fifth Exception. — For that the said master has allowed the complainant one tenth of the profits made by this respondent by the use and employment of a vessel called the Crusader, and its cargoes, during her second voyage, which was not sought to be recovered by the bill of the complainant as originally filed or as amended, and which was not and is not embraced by or in the contract of June 24, 1843.

Sixth Exception. — For that the master, in taking the accounts under the contract of June 24, 1843, did not ascertain the value of the assets which had been employed in the business to which the contract refers, at the expiration of the five years in the said contract mentioned, as should have been done in order to ascertain the profits in which the complainant under said contract was entitled to share, but, in taking the said accounts, erroneously allowed the complainant a portion of the profits made by the respondent in the prosecution of his business after the 3d of October, 1848, at which time the interest of the complainant in the business of the respondent altogether ceased.

Seventh Exception. — For that the said master, in taking the said accounts, has allowed the complainant a portion of the interest received by the respondent for the use of the money of this respondent subsequent to the 3d of October, 1848.

Eighth Exception. — For that the said master has allowed to the complainant, under the contract of the 7th of May, 1849, a portion of the profits made by the respondent in the prosecu-

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tion of his business and trade connected with Valparaiso, which was transacted and carried on by this respondent after the relation established by said contract between the complainant and the respondent had ceased, and the rights and interest of the complainant in the business of this respondent had altogether determined, which rights and interest did determine on or about the 1st of April, 1850, which business and trade were not conducted to completion by the said complainant, and which did not receive the full benefit of all the services of the complainant to its final accomplishment.

Ninth Exception. — For that the said master did not ascertain the profits made by the respondent in his Valparaiso trade, to which the contract of the 7th of May, 1849, refers, by ascertaining the value of the assets which had been employed in the trade, as it existed at the expiration of the time during which the complainant had an interest in the business and trade of said respondent under the said contract, as the said master should have done.

Tenth Exception. — For that the said master has allowed the complainant one fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7, 1849, nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent.

Wherefore the said respondent doth except to the said master's report, and appeals therefrom to the judgment of the Court.

The argument was upon these exceptions.

C. A. Welch and *E. D. Sohler*, for complainant.

Watts and *Peabody*, for respondent.

CLIFFORD, J. Ten exceptions are filed by the respondent to the master's report, which will be considered in the order in which they were made. In the first place, the respondent complains that he was not allowed by the master to debit the assets

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on hand, under the first contract, with the sums paid by him for clerk hire, taxes upon the property, and for advertising the business. Those expenses amount in the whole, as alleged by the respondent, to the sum of five thousand eight hundred and fifty dollars and sixty-eight cents, and it is insisted by the respondent that the decision of the master on this point was incorrect. Net profit was the basis prescribed by the contract, by which the amount of the complainant's compensation was to be ascertained. If there had been no net profit, then he would have been entitled to no compensation, except the six hundred dollars allowed for his support. As a general rule, the term "net profits" may be defined to be the gain made by the merchant in buying and selling goods after paying all costs and charges for transacting the business, and such it is insisted by the respondent is the sense in which the words are used in this instrument. By the terms of the contract, the complainant was entitled, at the expiration of five years, to one tenth of the net profits of the business in that trade, and by necessary implication the remaining nine tenths of the profits belonged to the respondent. Were this the whole of the contract, it would unquestionably follow, as is contended by the counsel for the respondent, that each of the nine parts of the profits belonging to the respondent ought to be equal to the one tenth part allowed to the complainant. On the part of the complainant it is insisted that the words "net profits," as used in this contract, must be understood in a special sense, and that they mean the gain made in the business after the expenses therein specially enumerated have been deducted. Suppose it to be so for the sake of the argument, it still remains to ascertain whether the charges in question are not properly embraced in the expenses appertaining to the goods themselves, which it is admitted are specially enumerated among those which are to be deducted. Unless clerk hire and expenses for advertising fall within that class of expenditures, it is difficult to see what terms short of the actual enumeration of those expenses could have been employed to accomplish that purpose. Expenses for clerk hire and advertising are as much incident to the transaction of mercantile business as those incurred for insur-

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ance, 'freight,' and storage, and the merchant might as reasonably calculate to procure goods without cost, as to expect to keep them on hand for sale without their being subject to taxation. Interest on capital was, doubtless, enumerated, on account of the special character of the arrangement, to exclude the conclusion that might otherwise follow, that the capital for the business was to be furnished by the respondent without any such allowance, and the same remark applies also to the costs and expenses in victualling, manning, and sailing the vessels employed, and keeping them in repair. Necessary expenses of that sort would arise at home as well as abroad, and hence it was provided that all such expenditures should be deducted from the gross proceeds of the business, in order to ascertain the net profits, to diminishing the usual signification of that term. For these reasons the first exception to the master's report is sustained.

Complaint is made, in the second place, by the respondent, that the master has erroneously charged the business with \$1,789.89, being the amount of a loss made in prosecuting the same, for which payment has not been made. Credit had been given to the debtors owing this sum to the amount of \$2,173.04 on the sale of a certain quantity of wool; but the amount actually due was in dispute. They tendered to the respondent, in 1850 or 1851, the sum of \$1,500, which he declined to receive. Nothing further was done by either party until January, 1857, which was three years after the demand was barred by the statute of limitations. At that time the debtors offered to pay the sum charged by the master to the general account, but the respondent refused to accept it, and also declined to allow the complainant to receive the proportion belonging to him, although the complainant was present and requested permission so to do. Mere omission to collect, without more, would not render the respondent liable for a claim of this description; but the claim in this case does not rest on that fact alone. He not only suffered the demand to be outlawed, but when the debtors voluntarily came forward after the limitation had taken effect, and offered to pay nearly the whole amount of the principal, he refused to receive it, and by virtue of his exclusive control over the accounts

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withheld from the complainant the means to adjust the proportion belonging to him. Suffice it to say on this point, that I am of the opinion that the decision of the master was correct, and for the reasons that he assigned for his conclusion. Both of the preceding exceptions refer to the business transacted under the first agreement, and so does the third, which will now be considered.

It is to the effect that the master has improperly allowed to the complainant one tenth of the profits made by the respondent in the construction and subsequent sale of the vessel called the Valdivia, which he alleges was sold by him for his own benefit. By the terms of the contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for this trade, at his option ; and it was expressly stipulated that the loss or profit attendant thereon should be charged or credited in the general account. According to the report of the master, the allegation that this vessel was never employed in the business is technically correct, but she was constructed under a contract made by the respondent, and was in fact built and designed for that purpose, and by the express words of the contract, the interest of the complainant to the full extent of his one tenth was made liable for all the risks and casualties in the business, whether attendant upon the goods or the vessels. As early as the 17th of March, 1846, and before the vessel was constructed, the respondent wrote to the complainant, informing him that he had made the contract for her construction, expressing the hope, at the same time, that she would make the outward passage in sixty-five or seventy days. On the 22d of August, 1846, he wrote again, to the effect that one of the masters employed in the business was waiting for this vessel, adding, in the same letter, that she would be despatched in November. His next letter is dated October 12, 1846, in which he informs the complainant that the vessel would be launched on the following day, saying she will be our next ship. In that letter he also informed the complainant that he had engaged a part of her outward cargo, and in a letter dated on the day following he instructed the complainant not to sell anything

to arrive by this vessel. During the period covered by this correspondence, and before any intimation had been given by the respondent of any different arrangement, the complainant, on the faith of these letters, had procured a part of her return cargo. Another vessel, however, was sent in her stead, and on the 15th of January, 1847, the respondent wrote to the complainant to the effect that he expected the complainant would be surprised, and perhaps disappointed, in seeing another vessel instead of the new ship, and admitting that he had been tempted to sell her for some \$9,000 or \$10,000 advance above cost. On these facts, and others which need not be reproduced, the master in this case found that the vessel in question was built and designed for this trade, within the meaning of the contract. It appears to the court that the finding is correct, and for the reasons assigned by the master, which need not be repeated. Accordingly the exception is overruled.

In the first account filed by the respondent, he credited the business with the sum of \$25,000 received by him, for the sale of the vessel called the Charlotte, and charged commissions on that sum for effecting the sale. That sale was made in February, 1849, as appears by the report of the master. Afterwards, he asked to reduce that credit to \$16,000, alleging that the last-named sum was the true value of the vessel, on the 3d of October, 1848, when the first agreement expired. His request was denied by the master. To that refusal he objected, and insists in his fourth exception, that, in taking the account, the master has fixed the value of the vessel at a period subsequent to the expiration of the five years mentioned in the contract, whereas it should have been fixed, as he contends, on the 3d of October, 1848, when the five years, from the time of the arrival of the complainant in Valparaiso, expired. When the agreement expired, as is assumed by the respondent, this vessel was at sea upon her fourth return voyage; and it appears, by the report of the master, that she did not arrive in Boston until the 5th of December, 1848. She was not sold until the following February; but the master reports that there was no evidence before him that the value was not about the same

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they remained in their hands they allowed interest. Remittances were not made by bills of exchange, but the proceeds of the outward adventure were invested in the purchase of return cargoes, and the remittances were made in that way. Interest paid by Alsop & Co., on the funds collected by them on the goods thus circumstanced, was charged by the master in the general account. To that allowance the respondent objected; and it constitutes the essence of his complaint as set forth in his seventh exception. Those funds were clearly at the joint risk, until they were received by the respondent, and no reason is perceived why the complainant is not entitled to his share of the interest accruing on the same. It is clear, therefore, that the seventh exception cannot be sustained.

Another position assumed by the respondent before the master was, that the second agreement terminated on the 1st of April, 1850, when the complainant gave the notice of his intention to withdraw from the business. His letter giving the notice was dated February 22, 1850; but it was not received until the 1st of April following. On the 13th of the same month the respondent replied, approving of the complainant's decision to join the house of Alsop & Co. at the time mentioned in his letter, and promising to comply with the complainant's request for an account as speedily as possible. He made no objection to his withdrawal, or to the time fixed for its accomplishment; and the case shows that the complainant remained and transacted the business as usual, up to the 31st of December, 1850, when he withdrew, and became a member of the house mentioned in his letter. On this state of facts, the master held that the relation between them, under the second agreement, did not terminate before the period when he joined that house. To that finding the respondent objected, and it constitutes the foundation of the eighth exception. It appears to the court that the finding of the master was correct; and the exception is accordingly overruled.

All that need be said concerning the ninth exception is, that it presents the same question, as to the mode of stating the account under the second agreement, as the one involved in the

sixth exception, touching the same subject under the first agreement, and must be overruled for the same reasons.

More difficulty arises in disposing of the tenth exception, which is the only one that remains to be considered. It alleges in effect that the master has allowed the complainant one fourth of the profits of the third voyage of the *Harriet Erving*, which, it is insisted, are not claimed in the bill or the amendments to the same, and that the voyage was not the subject of any agreement between the parties. Some reference to the pleadings, so far as respects the second agreement, becomes necessary, in order that the precise nature of the question presented may be clearly understood. As contended by the respondent, the bill sets up the contract, alleges that the complainant entered upon and conducted the business until December 31, 1850, when the agreement was terminated, by the complainant's giving due notice to the respondent in the manner provided in the contract. In the answer, the agreement is admitted; but the respondent denies that it constituted a partnership, as alleged in the bill. He also admits the complainant's right to withdraw on giving the required notice, and avers that the notice given was received by him on the 1st of April, 1850, and that he acknowledged its receipt, and expressed his satisfaction with the same. No additional agreement was made in respect to this voyage; and if the complainant is entitled to recover this claim at all, he must do so under the pleadings as stated, and the written agreement set up in this part of the bill of complaint. This vessel sailed from Boston, on her outward voyage for Valparaiso, on the 21st of August, 1850, more than four months after the notice had been received by the respondent. She arrived out on the 8th of December, 1850, and sailed thence for Coquimbo on the 27th of the same month. On the 4th of January, 1851, she sailed for Talcahuano, and afterwards, during the same month, for Boston, where she arrived on the 7th of April, 1851. By the terms of the second contract, under which this claim arises, the complainant was entitled to have one fourth part of the net profits of the respondent's business in that trade, which he should have conducted to completion. He was at liberty to with-

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draw at any time, by giving to the respondent so much notice, that any voyage he had commenced prior thereto should receive the full benefit of the complainant's services to its final accomplishment, and not otherwise. This voyage had not been commenced when the notice was given, nor until more than four months after the respondent received it, and had signified to the complainant his satisfaction at learning the decision to which he had come. At the time the vessel sailed on her outward voyage, both parties understood that the complainant had complied with the terms of the agreement in giving the notice, and that he was under no obligations arising out of its terms and conditions to transact this business. Beyond question, the reply of the respondent must be understood as an assent to the sufficiency of the notice; and if so, then both parties knew, or ought to have known, that their relations under the second agreement would terminate at the time therein specified. That the complainant so understood it is manifest, not only from the terms of the letter in which he gave the notice, but from his subsequent conduct in joining the house of Alsop & Co. at the time therein designated. It is admitted that the complainant joined the house of Alsop & Co., on the 1st of January, 1851, agreeably to his intention; as expressed in the letter giving the notice, and that he did not go to Coquimbo in this vessel, on the 27th of December, 1850. Another fact is also admitted, of some importance in this investigation, and that is, that the business after the 1st of January, 1851, was transacted by the house of Alsop & Co., and that the new agent of the respondent reached Valparaiso on or about the 1st of November, 1851. As before stated, this vessel arrived at Valparaiso on the 8th of December, 1850. Net sales of the voyage amount in the whole to the sum of \$205,620.74, as appears by the record. All of the sales were made by the house of Alsop & Co., who regularly rendered an account of the same to the respondent, for which they charged two per cent for guaranty, and four and one half per cent for commissions on sales. Sale of the cargo commenced on the 31st day of December, 1850, as appears by the account of sales, and was continued at different periods down to June 30, 1853. On each and all of

these sales they charged the six and one half per cent commissions, amounting to the sum of \$9,736.26. During the whole of the period through which the sales were continued the complainant was a member of that mercantile house, and as such, of course, received his share of those commissions. Whenever he assisted in the business, as appears to the court from the evidence, he acted in virtue of the new relations he had contracted, and not under the agreement with the respondent, which he had previously terminated by the notice. But it is insisted by the complainant that the parties understood their relations otherwise, and that there is evidence in the case sufficient to warrant the conclusion that they had agreed that this voyage should be settled and adjusted within the principles of the written agreement. Suppose it were so, it is not perceived that it would benefit the complainant in this suit, as the difficulty would still remain in all its force, that there is no proper allegation in the bill, or in either of the amendments, to support any such new agreement. After a careful examination of all the correspondence, I am of the opinion that it does not sustain that view of the case. On the contrary, it appears to me that both parties well understood that their relations, under the written agreement, so far as respects this voyage, had ceased. For these reasons, the tenth exception is sustained, and the accounts must be adjusted so as to conform to the opinion of the court. When that is done, the complainant will be entitled to a decree in his favor. Should any dispute arise in making the adjustment, the cause must be recommitted to the master, to make the necessary corrections.

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SAMUEL S. GREENE, IN EQUITY, v. WILLIAM BISHOP.

Exceptions to the report of a master should be so framed as not merely to allege error in general terms, but should indicate the particulars in which the error consists, in order that the court may understandingly decide upon each point in dispute.

An exception which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, and makes no suggestion of mistake, fraud, or undue influence, cannot in general be considered as sufficient to put the finding of the master in issue, or to require the court to revise the same, in a matter depending entirely upon the weight of evidence.

The party excepting to a master's report should require the evidence which furnishes the ground of the exception, to be stated by the master; if this is not done, the court will not enter at large into the evidence in order to ascertain if the master was correct in his conclusion.

The law does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright, for there may be a valid copyright in the plan of a book, as connected with arrangement and combination of the material, though all the materials employed, and the subject of the work, may be common to all other writers.

Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alteration to disguise the piracy.

It is not necessary that the whole or the larger portion of a work protected by copyright should be taken in order to constitute an infringement, but if so much is taken that the value of the original is materially diminished, or the labors of the original author appropriated to an injurious extent, such appropriation would amount to an invasion of the copyright.

THIS was a bill in equity praying that the respondent might be restrained from selling, or exposing for sale, copies of a certain book entitled "Covell's Digest of English Grammar," and that he might be ordered to render an account of the copies already sold. The bill alleged the complainant to be the author and proprietor of a certain book or treatise on the structure of the English language, called "Greene's Analysis"; and of another, entitled "Greene's First Lessons in Grammar," — both secured by copyright; that the respondent, in violation of the complainant's copyrights, published and sold copies of "Covell's Digest of English Grammar," which contained matter adapted from complainant's books, describing and setting forth his new system for the division and subdivision of sentences into various classes, with new divisions and subdivisions, invented and applied

by the complainant; that they defined, adopted, and used, in the same manner with the complainant, the new names invented and employed by him, to express and distinguish the new classes, divisions, and subdivisions of sentences; and, that they also imitated the form and use of the exercises, as composed and arranged by the complainant, for the purpose of teaching and illustrating the composition of sentences; and, finally, that the books, as published and sold by the respondent were substantially of the same motive and plan throughout as the books of the complainant, and intended to supersede him in the market with the same class of readers and purchasers, without introducing new matter and with only colorable variations.

The answer, admitting the sale of a certain number of the second edition of "Covell's Digest of English Grammar," denied any infringement of the complainant's copyrights, and alleged, moreover, that the complainant was not the author or inventor of the materials, ideas, principles, knowledge, information, and exercises contained in his books; that the plan of the "Digest of English Grammar" was essentially different from that of the complainant's books; and that, by reason of a better arrangement and treatment of the subjects, and by reason of various subject-matters contained therein, whereof he was the author, and of which he had the copyright, the respondent's book was better suited and adapted for general use.

When the cause came on for final hearing, it was ordered to be referred to a master, to examine the pleadings and proofs, and to report to the court, whether the plan of the respondent's book, or any parts or matters therein, were similar to the plan of the complainant's books, or any parts or matters therein, and if so, to specify the same; also, to report whether the same, or any part thereof, and which part, were original with the complainant; and also, whether the use in the respondent's book of the parts or features taken from the complainant's books, and original therein, tended to prejudice, and to what extent, the sale of the books of the complainant.

The master reported as follows:—

1st. That, of the books stated in the bill to have been sold

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and exposed for sale by the defendant, the only books so sold or exposed were certain copies of "Covell's Digest of English Grammar," of each of the second, third, and fourth editions, and that the contents of the copies of these several editions are the same.

2d. That the plan of the defendant's book, taken as a whole, is not similar to the plan of either of the plaintiff's books, but that, in that part of the defendant's book which treats of analysis, and which is contained between sections 138 and 181 inclusive, the system on which the materials are arranged, the logical order in which the subject is displayed, and the mode by which it is set forth, and illustrated by copious models and examples, are similar to those of the plaintiff's entire book, entitled "Greene's Analysis."

3d. That the parts and matters of the defendant's book, specified in the schedule hereto annexed, marked A, are similar to the parts and matters contained in the plaintiff's book, also specified in the schedule hereto annexed, marked B.

4th. That the parts and matters named in Schedule B, in the logical connection in which they stand in the plaintiff's book, and in which they are taken and used by the defendant, form an original part of an original system of grammar, set forth in the plaintiff's said book; the schedules annexed indicate the order in which these parts and matters appear in the respective books.

5th. That the use of said parts and matters, by the defendant, tends to prejudice the sale of the plaintiff's book, called "Greene's Analysis," to the extent of preventing the sale of as many copies of the plaintiff's book, called "Greene's Analysis," that there are sold copies of the defendant's books, called "Covell's Digest."

The schedules referred to in the report are not necessary to a proper understanding of the points decided by the court, and are therefore omitted.

To this report the respondent excepted as follows:—

First Exception.—For that in said report it is reported that in that part of the defendant's book which treats of analysis, the plan on which the materials are arranged, the logical order in

which the subject is displayed, and the mode in which it is illustrated and set forth, by copious models and examples, is similar to those of the plaintiff's entire book *Analysis*.

Second. — For that it does not appear by said report wherein the plans of the two books correspond, nor in what the alleged similarity in the logical order in which the subject of analysis is displayed, and the mode in which it is set forth and illustrated by examples consist.

Third. — For that the system of grammar and instruction in the plaintiff's books, so far as the same is similar to that in the defendant's book, is not original with the plaintiff, nor an original part of his work. In support of which exception the defendant refers to the proofs taken in the case, which are the same with those produced before the master; and also to the books of the parties, and to those of George Crane, De Lacy, and Kühner, produced before the master and made a part of the case as exhibits therein.

Fourth. — For that the plan on which the materials are arranged in the plaintiff's entire book *Analysis*, the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated by copious models and exercises, so far as the same are similar to that part of the defendant's book which treats of the subject of analysis, are not original with the plaintiff's, in support of which exception the defendant refers to the books and proofs above mentioned.

Fifth. — For that said report does not indicate, specify, or show what parts or matters of the plaintiff's books, if taken out of their connections, are original with the plaintiff, or what parts or matters are collated from treatises mentioned in said report.

Sixth. — For that the resemblance between the books of Greene and Covell is not other or greater than necessarily or properly belongs to two books on the same subject written for the same purpose, and treating of a department of learning within the course and studies of education, and it does not involve the borrowing by one of these authors from the writings of the other, as will appear by reference to proofs in the case, and by the examination of the several books of the parties.

Seventh. — For that it appears by the proofs that all the matters in Greene's book similar to Covell's book were contained in previous publications of other authors, and were not original with Greene.

Eighth. — For that it appears by the proofs that Covell framed his book of his own ample general knowledge of the subjects treated, and from wide studies in previous books, and not from the works of Greene.

Ninth. — For that in said report it is reported that the use of the parts and matters mentioned tends to prejudice the sale of the plaintiff's books, and to the extent mentioned.

Tenth. — For that the report does not clearly and definitely show what matters of Covell's book similar to Greene's are original with Greene.

Eleventh. — For that it appears by the master's report, and the schedule annexed to it, that the said Covell's book does not use the language of the plaintiff's books, but simply expresses and condenses the views of the plaintiff, and is not an infringement of his copyright.

Twelfth. — For that in said report it is reported that certain passages in the defendant's book, in the connection in which they stand, are similar to certain passages in the plaintiff's books in the connection in which they stand, and original with the plaintiff in their connection.

The arguments were upon these exceptions.

Sidney Bartlett and Lemuel Shaw, Jr., for complainant.

B. R. Curtis and Thornton K. Lothrop, for respondent.

CLIFFORD, J. Twelve exceptions are taken by the respondent to the report of the master. Excluding the eleventh, which deserves a separate consideration, all the residue may conveniently be divided into three classes. First, such as merely express dissatisfaction with the report in the form of general objections to the conclusions of the master upon the evidence, or to the results arrived at by him, and are in substance and effect nothing more than an appeal from the determination of the master to the court to revise and reverse his decision, or rather to determine the matters in controversy on a review of the

testimony, as if no order had been passed or report made, and precisely as in case of final hearing upon pleadings and proof without reference. To this class belong the first, third, fourth, ninth, and twelfth exceptions, as numbered in the printed copy of the same.

Second, such as allege directly or indirectly that certain other matters are omitted or insufficiently stated in the report, which it is alleged the order of reference required should be reported. This second class includes the second, fifth, and tenth exceptions.

Third, such as complain in effect that certain other matters are omitted in the report which it is alleged appear in the proof, without affirming whether or not they are required to be reported by the order of reference, or even suggesting that the master was required to include them in the report. All the remaining questions, except the eleventh, are included in this class. Exceptions to a master's report are written enumerations of the errors alleged by the complaining party, and of the corrections he requests to have made; and they should be so framed as not merely to allege error in general terms, but should be sufficiently definite and explicit to enable the court understandingly to decide on each point in dispute. Such appears to be the just and convenient rule to be deduced from the best considered modern cases upon the subject, and it is one of great importance in this class of legal investigations, and ought in general to be strictly enforced. Were it otherwise, the reference to the master would be of little or no avail, as it would involve the necessity for the court to look into the whole testimony laid before him, and to decide the controversy as upon final hearing, without reference as on appeal.

General allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the cause anew, and should that practice prevail, references such as made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the

labor of the trial, or ever accomplishing anything of value to either party. Marshall, Ch. J., said, in *Harding v. Handy*, 11 Wheat. 126, that the report of the master is received as true when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by the evidence which ought to be brought before the court by reference to the particular testimony on which the excepting party relies; and the same court held, in *Story v. Livingston*, 13 Pet. 366, that exceptions to the report of a master in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted. That doctrine had been previously recognized in *Wilkes v. Rogers*, 6 Johns. 592, and in *Dexter et al. v. Arnold et al.*, 2 Sumn. 125, and is not different from the rule which generally prevails in chancery courts. *Da Costa v. Da Costa*, 3 P. W. 140. Applying these principles to the present case, it is quite obvious that the first exception of the respondent cannot be sustained. He objects to the report in that exception, because it finds that, in the particular part of his book which treats of analysis, the plan on which the materials are arranged, the logical order in which the subject is displayed, and the mode in which it is illustrated, and set forth by copious models and examples, are similar to those of the entire book of the complainant, entitled "Greene's Analysis," without specifying any particular whatever in which the report is erroneous. It merely alleges that the finding of the master is erroneous and unsatisfactory, without attempting or pretending to specify any particulars in which the error consists, or even suggesting what correction ought to be made, and omits altogether to refer to any portion of the testimony to support the allegation. Assuming the rule of law to be as heretofore stated, that a mere general assignment of error cannot be supported, it clearly follows that the exception under consideration is not well taken, and it is accordingly overruled. More importance is attached to the third exception, which is the next in the series embraced in the first class, and it deserves to be more carefully considered. It

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directly controverts the correctness of the fourth finding of the master, and alleges that the system of grammar and instruction, so far as the same is similar to that of the respondent's book, is not original with the complainant, nor an original part of his work.

In support of the allegation, the respondent refers to the proofs in the case, and avers that they are the same with those before the master. Beyond question, this exception refers to a branch or element of the controversy expressly referred to the master, and which was clearly within his jurisdiction. He was directed by the order of reference to report whether the plan of the respondent's book, or any parts or matters therein contained, are similar to the plan of the complainant's books, or any parts or matters therein set forth; and if so, to specify the same, and also to report whether the same or any part thereof, and which, are original with the complainant. Following the directions of the order, he accordingly specified the parts and matters which were similar, as described in the schedule annexed to the report, which constituted part of the same, and reported that the parts and matters so specified and described in the logical connection in which they stand in the book of the complainant form an original part of an original system of grammar, as therein set forth. These references to the order under which the master acted, to the report made in pursuance thereto, and to the nature and character of the objection to the finding, will be sufficient to demonstrate the proposition, that the only question that can arise under the exception is, whether the master has duly considered and properly weighed the evidence submitted to his consideration. It is therefore in every sense an appeal from the decision of the master, in a matter of fact properly referred to him, and clearly within the scope of the power conferred in the order of reference, and in substance and reality requires the court to review the whole evidence, and to revise and reverse the decision of the master upon a question depending entirely upon the weight and effect of the testimony on which the decision was made. It should be observed that the exception under consideration contains neither suggestion of mistake nor gross error,

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nor imputation of undue influence or fraud ; and I hold that an exception like the present, unaccompanied by any such suggestion or imputation, and which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, cannot in general be regarded as sufficient to put the finding of the master in issue, or to require the court to review and revise the same in a matter of fact dependent entirely upon the weight and effect of the evidence submitted to his consideration. Exceptions irregularly taken may properly be overruled, without any examination of them in connection with the report of the master. *Story v. Livingston*, 13 Pet. 386. Nevertheless, if the court were satisfied that any error had been committed by the master in the finding referred to in the exceptions, it would be competent for the court to recommit the report, in order that the error might be corrected ; and in a case where the error was satisfactorily and clearly shown, it would become the duty of the court to adopt that course. Such questions, however, bear a strong analogy to motions for a new trial at common law, in which it is not usual to interfere in a matter of fact unmixed with any question of law depending upon the weight and effect of the evidence, unless it is clearly shown that there has been manifest error. My opinion is, that there has been no such error in the present case ; after a thorough examination of the books both of the complainant and the respondent, and a careful consideration of the testimony introduced upon the one side and the other, and a comparison of the same with the report of the master, I am satisfied that the finding is correct, and the exception is accordingly overruled. All the remaining questions included in the first class must also be overruled for the same reasons.

Sufficient has already been remarked to show that no one of the exceptions included in the second class can be sustained. Their great and controlling error consists in the theory of fact upon which they are respectively based. Every one of the reasons, which it is alleged in the second exception are omitted, are sufficiently and satisfactorily stated in the respective sched-

ules annexed to the report, and which necessarily constitute a part of the same. In effect, they describe the plan of each book, and distinctly give the order in which the subject of analysis is therein displayed, and state the mode in which it is set forth and illustrated by examples; and the report expressly affirms that the respective schedules indicate the parts and matters specified as similar in the respective books, showing conclusively that the facts assumed in the exception are not correctly stated. All the answer that need be given to the fifth and tenth exceptions is to say that every matter and thing therein alleged to have been omitted by the master will be found to be stated in his findings, and to refer to the report in verification of the remark. They are accordingly overruled.

It is admitted by the counsel for the respondent that the sixth, seventh, and eighth exceptions, constituting the third class, cannot be sustained, and they are respectively overruled without further remark. Judge Story held, in *Donnell et al. v. The Columbian Ins. Co.*, 2 Sumn. 371, that, when exceptions are taken to the report of a master in chancery, the evidence which furnishes the ground of the exception should be required by the party excepting to be stated by the master; and in effect declared that, unless it be done, the court will not enter at large into the evidence in order to ascertain whether or not the master was wrong in his conclusion. Masters are required, in a case like the present, to report conclusions; and, in general, it is irregular for them to incorporate the details of the evidence into their reports, without the direction of the court. They should, however, especially when it is requested by either party, specify and identify the evidence, and refer to it in such a manner as to inform the court on what state of facts their conclusions are based. It was so held by Chancellor Walworth, in the matter of *Hemiup*, 3 Paige, Ch. R. 307; and such appears to be the purport and spirit of the requirement contained in the eighty-sixth rule, regulating the practice in equity suits. Of all the objections to the draft report, only one contains a request to the master to report any portion of the evidence, and no one of the exceptions alleges, or even intimates, that the report, as made, does not con-

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stitute a satisfactory compliance with the request. No application was ever made to the court; and in the absence of any suggestion that any injustice has been done in this behalf, it must be assumed that the master has well and truly performed his duty.

With these remarks, all of the exceptions may be dismissed but the eleventh, which remains to be considered. It alleges that it appears by the master's report, and the schedule annexed to it, that the book of Covell does not use the language of the complainant's books, but simply expresses and condenses the views of the complainant, and is not an infringement of his copyright. Some doubt exists in the mind of the court as to what is meant by the exception, arising out of the vagueness of the language employed, and the involved manner in which the ideas are expressed. It does not allege that Covell's book does not use the language of the complainant's books, nor that it simply expresses and condenses his views, but only affirms that it so appears from the report of the master, and the schedule annexed to the same. Unless its meaning be such as is supposed, the exception might well be overruled as too vague and indefinite to constitute the foundation of a decree. Assuming that the purpose and intent of the pleader has been correctly defined, then it is certain that it does not directly challenge any comparison of the respective books with each other, or with the findings of the master, but refers to the report, and the materials set forth in the schedule, on the basis that they were correct; and, if so, it is clear that the exception cannot be sustained, as it rests upon a theory of fact expressly negatived by the report, and, in the judgment of the court, the materials set forth in the same fully warranted the conclusions reported by the master. For these reasons the eleventh exception is also overruled; and the report of the master must be confirmed.

At this stage of the case, the complainant moves for an injunction, and that the respondent may be ordered to render an account in pursuance of the prayer in the bill of complaint. That motion must be considered and determined on the basis that the report of the master is correct, and wholly irrespective

of any matters alleged in the exceptions. Any argument founded upon such matters cannot now avail, as the exceptions have been overruled, and the report of the master confirmed. For the purposes of any further examination of the case, and especially in determining the question under consideration, it must be assumed that the facts are as they have been found to be in the report of the master. Matters not included in the findings, and not embraced in the order of reference, if any, will depend upon the evidence, and must be heard and determined by the court, as in other cases, upon final hearing. All the matters found by the master, and embraced in the order of reference, must now be taken to be true. These findings show in effect that the system on which the materials are arranged in that part of the respondent's book which treats of analysis, as well as in the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated, are similar to those of the entire book of the complainant, entitled "Greene's Analysis"; that the parts and matters of the respondent's book specified in the schedule are similar to the parts and matters in the complainant's book, which are also specified in the opposite schedule; and that the parts and matters thus specified in the logical connection in which they stand, and in which they are used by the respondent, form an original part of an original system of grammar set forth in the complainant's book; and they also show that the use of those parts and matters by the defendant tends to prejudice the sale of so many copies of the same as there are sold copies of the respondent's book. On that state of the case the counsel for the respondent contend:—

1. That the system of analysis and classification of sentences set forth in the complainant's book is not original with the complainant.

2. That the respondent, or those he represents, did not copy from the complainant's book what in judgment of law was exclusively secured to the complainant.

3. That the use made by Covell of the analysis of the complainant, if any, was in the fair exercise of his powers as an author engaged in good faith in composing an original work, and

fairly availing himself of ideas and terms found in other scientific treatises upon the same subject; and that he did not servilely copy from the complainant's work so much thereof in quantity and value as amounts to an infringement of his copyright.

4. That the complainant is not entitled to an injunction or to an account, under the circumstances of this case.

Some additional observations upon the objection embraced in the first proposition may be useful and necessary, notwithstanding it is identical in principle with the third exception, which has already been considered and overruled. By the first section of the act of the 3d of February, 1831, it is provided that the author of any book "shall have the sole right and liberty of printing, reprinting, publishing, and vending such book"; but it is undoubtedly true, as contended by the counsel for the respondent, that when a party comes into a court of law or equity, seeking protection to a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication. Curtis on C., ch. 5, p. 169. An author, as was remarked by Grier, J., in *Stowe v. Thomas*, 2 Wall. Jr. 564, may be said to be the inventor or creator of the ideas contained in his book, and the combination of words to express them. But when he has published his book, and given his thoughts to the world, he can no longer have their exclusive possession, for the reason that such an appropriation then becomes impossible, and inconsistent with the object of the publication; and he accordingly held to the effect, that when an author has published and sold his book, he ceases to have any exclusive claim to the ideas, sentiments, or thoughts therein expressed, considered merely as abstractions, and dissevered from the language, idiom, style, or the outward semblance or exhibition of them to the eyes of another; and that the only property which he reserves to himself, and which the law gives him under such circumstances, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to others the ideas intended to be conveyed. Assuming the doctrine there laid down to be correct, of which, as a general

proposition, or as one applicable to that case, there can be no doubt, it by no means follows, as seems to be supposed, that an author who has compiled and written a new work upon a new and original plan, arrangement, and combination of materials, not servilely copied or evasively imitated from another, is not entitled to a copyright for the work, even though all the materials employed by him were old. Elementary writers and jurists concur that the law does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright; and all appear to admit that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials, and the mode of displaying and illustrating the subject, although all the materials employed and the subject of the work may be common to all other writers. Reference to two or three decided cases upon the point will be sufficient at the present time, although there are several others which assert the same doctrine; and it will be observed that one of the examples put by Mr. Curtis, in his valuable work on copyright, to illustrate the doctrine, is that of a scientific treatise written and published for the purposes of instruction. Speaking of the question under consideration, he says, in effect, that the author of a book, who takes existing materials from sources common to all writers, and arranges and combines them in a new form, and gives them an application unknown before, is protected in the exclusive enjoyment of what he has thus collected and produced, for the reason that he has exercised selection, arrangement, and combination, and thereby has produced something that is new and valuable. Curtis on C., pp. 179, 180; *Gray v. Russell*, 1 Story, 17; *Emerson v. Davies*, 3 Story, 768; *Lewis v. Fullerton*, 2 Beav. 6; *Story v. Holcombe*, 4 McLean, 309. Judge Story held, in *Emerson v. Davies*, that every author of a book has a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance; and remarked that if no book could be the subject of copyright which was not new and original in the elements of which it is composed, then there could be no ground

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for any copyright in modern times. All the well-considered cases upon the subject show that the state of facts found by the master are sufficient to entitle the books of the complainant to protection under his respective copyrights; and, as before remarked, the evidence in the case fully warrants the findings of the master.

Little more need be remarked respecting the second proposition than to refer to the findings of the master, and what has already been said in determining the one which precedes it, and which involves the same general considerations. Copying is not confined to literal repetition, but includes, also, the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the piracy. In all such cases, says Mr. Curtis (Curtis on C. 253), the main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all writers, or whether he has adopted and used the plan of the work which it is alleged he has infringed, without resorting to the other sources from which he had a right to borrow. Within these principles, both the report of the master, and the evidence on which it is founded, show that the respondent has copied what in judgment of law was exclusively secured to the complainant, under and by virtue of his respective copyrights.

Great difficulties oftentimes surround the inquiry, whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or that the use made of the book or its contents does not exceed what the law permits to another engaged in composing a new work upon the same subject. None of those difficulties, however, arise in the present case, as all the authorities agree that it is not necessary that the whole, or even the larger portion, of a work should be taken in order to constitute an invasion of a copyright; and they affirm the doctrine, that if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that

such taking or appropriation is sufficient in point of law to maintain the suit. *Folsom et al. v. Marsh et al.*, 2 Story, 100; *Wilkins v. Aiken*, 17 Ves. 424; *Mawman v. Tegg*, 2 Russ. 385; *Roworth v. Wilkes*, 1 Camp. 94; *Saunders v. Smith*, 3 My. & Cr. 711; *Lewis v. Chapman*, 13 Beav. 8; *Webb v. Powers*, 2 Wood. & M. 514.

Whatever doubts may have been formerly entertained, says McLean, J., in *Story v. Holcombe*, 4 McLean, 315, it is now clear that a book may in one part of it infringe the copyright of another book, and in other parts be no infringement; and, in such a case, the remedy will not be extended beyond the injury; and the same learned judge held that extracts made for the purpose of a review, or for a compilation, are governed by the same rule; but that they cannot be so extended in either case as to convey the same knowledge as the original work, nor can the privilege be so exercised as to supersede the original book. *Bramwell v. Halcomb*, 3 My. & Cr. 738. Apply these principles to the facts stated in the last finding of the master, and it is clear that this proposition cannot be sustained. Whether a fair and *bona fide* abridgment of an original work is, or is not, an invasion of the copyright of the original author, is not a question at the present time, nor is it necessary on the facts of this case to determine, or even consider, what constitutes such an abridgment in the sense of the law. It is clear that the mere copying a portion of the materials, without any essential condensation of the same, cannot be held to bring the work within the legal description of such a publication; and it will not change the rule of law if the new publication also contains the system on which the materials are arranged, the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated in the prior work. One other suggestion of the counsel for the respondent deserves to be considered before leaving this branch of the case. They also contend, in effect, that the respondent is an original author, without having copied or had access to the complainant's books. On this point it will be sufficient to remark, that the weight of the evidence is greatly otherwise, as appears from the testimony of the witnesses, as

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well as from the inspection of the book and the colorable alterations made in the second edition.

Two grounds are assumed in support of the fourth proposition, which will now be briefly considered. First, that the complainant is not entitled to relief on account of the delay in instituting the suit, and because it is prosecuted against the vendor of the book, and not against the author or publishers, Second, because it is brought merely for a technical violation of the legal right, and because the facts show that the complainant has suffered injury only to a nominal amount. A few remarks respecting each of these suggestions will be sufficient at the present time. Both the bill and the answer disclose the fact that the first edition of the respondent's book was published in 1852, in another State; and the second, in 1853, by the same publishers, while the complainant was residing in this district, and this bill was filed during the following year. At what time the complainant became possessed of the knowledge of these publications does not appear; and there is no evidence tending to show that he ever in any manner acquiesced in the claim of the respondent, or recognized the validity of his acts, except what may be inferred from the omission to prosecute. No other laches appear on the face of the bill, and no such defence is set up in the answer. Attention is drawn to two cases, decided in this court, to show that it is incumbent upon the complainant to set forth in the bill the circumstances, if any, which explain the delay to institute the suit. One is the case of *Stearns v. Page*, 1 Story, 204, in which the bill prayed for an account of an intestate's estate after a lapse of more than twenty years; and the other is the case of *Fisher v. Booddy et al.*, 1 Cur. 218, which prayed to set aside a conveyance of land, after an acquiescence in the validity of the sale for a period of nine years. Without entering into any further examination of the numerous authorities bearing upon the question, or attempting at this time to lay down any general rule upon the subject, it will be sufficient to say that the cases cited are not applicable to the facts of this case, and that the point cannot avail the respondent as a defence to this suit. *Wagner v. Baird*, 7 How. 234; *De Lane et al. v.*

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Moore et al., 14 How. 268. Vendors are liable for the sale of a book which invades the copyright of another, on the same principle, and for the same reasons, that the vendor of a machine or other mechanical structure, in the case of patent rights, is held liable for selling the manufactured article without the license or consent of the patentee; and no reason is perceived for withholding from the complainant the common remedies for the injuries he has suffered by the acts of the respondent, merely because he has elected to seek redress in this district, instead of going into another circuit to pursue it against the publishers. Decided cases have been cited by the counsel for the respondent, which show that when the invasion of a copyright is slight, and the copying consists of indefinite or small parts, so scattered through the work that it is difficult or nearly impossible to estimate either the amount of the injury to the complainant, or the profit to the respondent, relief in equity has sometimes been refused, and the party turned over to his remedy at law. Those decisions were doubtless correct as applied to the facts and circumstances under which they were made; but it is clear, both from the finding of the master and all the evidence on which it is based, that no such difficulty can arise in this case; and consequently I hold that the complainant is entitled to an injunction, to be limited according to the second finding of the master, and also to an account.

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RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1858.

IRA BARROWS v. BENONI CARPENTER.

In an action of libel, if the defendant intends to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, he must plead it specially; he cannot give in evidence the truth of the imputation without pleading such truth as a justification.

Where the charge is general in its nature, the defendant in a plea of justification must state some specific instances of the misconduct imputed to the plaintiff, but irrelevant matter will not vitiate, even on special demurrer.

It is sufficient if the defendant's plea answer the whole substance of the plaintiff's declaration.

The plea is required to state the substantial facts which constitute the elements of the charge when it is general.

ACTION on the case for libel. The subject-matter of the complaint in the declaration was the republication, in a newspaper called "The Business Directory," published at Pawtucket, of an article which originally appeared in the "Boston Medical Journal." At the argument, it was agreed that the declaration was in the usual common-law form, with the usual and necessary innuendoes; and the court was furnished with a printed copy of the article which was the subject of complaint. As originally filed, the pleas were the general issue, and a special plea partaking of the nature of a plea of privileged communication. To the special plea the plaintiff demurred, and the court sustained the demurrer; but on motion to the court for that purpose, the defendant had leave to withdraw his special plea, and to file a substitute in its place. He availed himself of the leave granted, and filed a plea of justification which stated the particulars of the charge in the libel. To this plea the plaintiff demurred specially, showing twenty causes for its insufficiency. Some of the causes assigned were abandoned at the argument; others

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were overruled by the court, upon the ground that the objections set forth in them, being based upon merely verbal or clerical errors, such errors in the plea might be amended as of course. The character of the other causes set down in the demurrer sufficiently appear in the opinion of the court.

R. Mathewson and *A. Payne*, for plaintiff.

C. S. Bradley, for defendant.

CLIFFORD, J. In the first place, the plaintiff complains that the defendant, in the introductory part of his plea, has introduced and attempted to put in issue matters of fact not necessary to be alleged, and which are wholly impertinent and foreign to the cause. Various specifications are made under this head, but, in the view we have taken of the plea, they may all be considered together. Defences in actions of libel and slander, which go to a general denial of the whole declaration, must be tried under the general issue. Certain other defences must be pleaded specially, and cannot be thus given in evidence, even although they afford a conclusive bar to the action. Whenever the defendant means to insist that the imputation of the charge, as laid in the declaration, is true, he must plead such defence specially, for the reason that the matter which supplies the justification is collateral to the cause of action, and the proof of it does not contradict or repel any fact which the plaintiff would be bound to prove. On grounds of convenience and policy, also, it is obviously just and necessary that a party charged with the commission of an illegal or immoral act should be apprised of the nature and circumstances of the charge, in order that he may be prepared to meet it, and, if it be unfounded, to refute it. These considerations induced courts of justice at a very early period to adopt the rule that the defendant, if he means to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially. No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation, without pleading such truth as a justification. *Underwood v. Parks*, 2 Strange, 1200; *Smith v. Richardson*, Willes, 20; 1 Chit. Plea. 12 Am. ed. 494; *Shepard v. Merrill*, 13 Johns. 475.

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Confine the application of the rule to the precise case described, and the law is clear; but there are two kinds of defences, in actions of this description, which constitute a complete bar to a recovery. One is properly denominated a justification, and consists in showing the entire truth of the charge which is the subject of complaint, and therefore falls within the rule already stated, and must always be specially pleaded; but the other consists in showing that the utterance or publication was honestly made by the defendant, believing it to be true, and that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication. Proof of such facts go to negative the inference of malice, and, consequently, afford a defence to the action, unless express malice be proved by the plaintiff. Evidence to maintain a defence of this latter kind is admissible under the general issue, or the defence may be specially pleaded at the election of the defendant. *Hastings v. Lusk*, 22 Wend. 416; *Lillie v. Price*, 5 Ad. & E. 645; *Swan v. Tappan*, 5 Cush. 104; *Fairman v. Ives*, 5 B. & A. 642; *Somervill v. Hawkins*, 3 Eng. L. & Eq. 503; *Toogood v. Spyring*, 1 Crompt. Mee. & Ros. 181; 2 Greenl. Ev. § 421; *Bradley v. Heath*, 12 Pick. 163. On the other hand, it is perfectly well settled, as before remarked, that the defendant cannot be permitted to prove the truth of the words under the general issue, either in bar of the action or in mitigation of damages. 2 Greenl. Ev. § 424. Every plea of justification, setting up the truth of the charge, ought to confess the publication, as laid in the declaration, otherwise it will be bad on demurrer. Three rules are suggested by Mr. Chitty, which it would be well to follow in framing such a plea: 1. He says it is necessary, although the libel contain a general imputation upon the plaintiff's character, that the plea should state specific facts, showing in what particular instances and in what exact manner he has misconducted himself; 2. That the matters set up by way of justification should be strictly conformable with the charge laid in the declaration, and must be proved as laid, at least in substance; and 3, That, if the matter of justification can be extended to the whole of the

libel or slander, the plea should not be confined to a part only, leaving the rest unjustified. 1 Chit. Plea. 12 Am. ed. 495. Numerous cases are reported where the plea has been held bad, as wanting the requisites prescribed in the first rule, because the pleader had not shown the particular instances of illegal or immoral conduct imputed to the plaintiff, or in what exact manner they had occurred. Parke, B., said in *Hickinbotham v. Leach*, 10 Mees. & Wels. 363, that it is a perfectly well-established rule, in cases of libel or slander, that, where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. His views in that behalf are nothing more than a repetition of the first rule prescribed by Mr. Chitty and other writers upon the law of pleading, and appear to be sustained by all the well-considered cases upon the subject. *Newman v. Bailey*, 2 Chit. 665; *Holmes v. Catesby*, 1 Taunt. 543; *Jones v. Stephens*, 11 Price, 235; *J'Anson v. Stuart*, 1 T. R. 748. In this last case, the objection to the plea was the opposite of the present one, and it was decided that the plea was bad, on account of its generality. Among other reasons given for the decision, it was said by Ashurst, J., that the charge laid in the declaration was the charge of the defendant, and the plaintiff was bound to state it as it was made, but it does not follow that the defendant ought to justify in so general a way. When he took upon himself to justify generally, he must be prepared with the facts which constitute the charge, in order to maintain his plea; then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. Beyond question, the correct rule of pleading in such cases is stated by Mr. Starkie, when he says that a party charged with an illegal or immoral act has a right to be apprised, by means of a special plea, of the nature and circumstances of the charge, in order that he may be prepared to meet it. 1 Stark. on Slander, 466. Similar views were held by the Supreme Court of New York in *Van Ness v. Hamilton*, 19 Johns. 368; and also in *O'Brien v. Bryant*, 16 Mees. & Wels. 170, where an

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amendment was allowed to the plea, stating the circumstances with greater latitude than is done in the present case. Applying these principles to the plea under consideration, it is obvious that the objection cannot prevail. Care should be taken, undoubtedly, both in framing the declaration and the plea responsive to it, not to allege the collateral circumstances too minutely, and not to allege more than is necessary; for where the actionable quality of the publication depends wholly on its connection with collateral matter, a variance in a material point in the proof of those matters might be fatal to the party committing the mistake. But suppose the rule were otherwise, and that the particularity of statement in this plea were unnecessary, still it could not benefit the plaintiff in the present state of the pleadings. Matter wholly foreign and irrelevant to the cause may be rejected, as surplusage in a plea, as well as in a declaration or an indictment. Such irrelevant matter will not vitiate even on special demurrer, it being a maxim of the law that *utile per inutile non vitiatur*. 1 Chit. Plea. 12 Am. ed. 228; Com. Dig. Plea. ch. 29. By these remarks we do not mean to admit that the plea contains any matter foreign to the issue. On the contrary, we are of the opinion, if the statements are true, they are no more than a proper explanation of the nature and circumstances of the charge; and in point of fact, that, if less had been stated, the plea would have been objectionable, on the ground of generality. If the statements of the plea are untrue, they may be denied by the plaintiff in his replication, and we have no doubt that such is his proper remedy.

Complaint is also made that the plea does not fully answer the declaration. None of the authorities, when carefully examined, require any more of the defendant than that his plea should answer the whole substance of the plaintiff's declaration. When the plaintiff has proved the substance of his declaration, he has made out his case; and upon the same ground, and for the same reason, when the pleadings and proofs of the defendant have substantially answered the charge, as laid in the declaration, the defence is complete. 1 Stark. on Slander, 374.

Another ground of complaint is that the plea is wanting

in the requisite certainty to apprise the plaintiff of the nature and circumstances of the charge. Courts of justice agree that a plea of justification, in actions of libel and slander, must contain a specific charge set forth with certainty and particularity; and it is sometimes said that the plea ought to state the charge with the same precision as in an indictment. To maintain an action of libel, however, it is not necessary that the publication should impute an actionable offence to the plaintiff. Any writing, picture, or sign which derogates from the character of an individual, by imputing to him either bad actions or vicious principles, or which tends to diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, is actionable without proof of special damage. *Cooper v. Greely*, 1 Den. 363; *Clark v. Binney*, 2 Pick. 115. When the charge is general, the defendant is required to state the substantial facts which constitute its elements; and when that condition is fairly fulfilled, he has done all that the law requires to maintain his plea. Such a plea, says Spencer, Ch. J., in *Van Ness v. Hamilton*, 19 Johns. 368, must be certain to a common intent. It must be direct and positive in the facts set forth, and must state them with all necessary certainty. All the material facts set forth in the plea must be considered as admitted by the demurrer; and, assuming them to be correctly stated, it is difficult to perceive in what other manner the justification in this case could have properly been interposed. One of the specifications under this head is, the want of a more definite description of the territory claimed to be included in the "circle of professional business" embraced in the contract between these parties. That phrase is the one employed by the parties in making the contract, and the contract is fully set forth in the plea. Both parties having adopted that description as one suitable to express their intentions, it cannot now be held that it is insufficient to apprise the plaintiff of the nature and circumstances of the charge. Without entering more into detail, we are of opinion that the plea is sufficient, and the demurrer is accordingly overruled.

Adams v. Bark Island City and Cargo.

MASSACHUSETTS DISTRICT.

MAY TERM, 1859.

JOSEPH H. ADAMS, Libellant, v. BARK ISLAND CITY AND CARGO.

In order to bar a claim for salvage there must be a distinct agreement proved between the parties for a given sum, to be paid whether the property be lost or not. It is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it.

The mere fact that a libellant alleges his claim to be "in a cause of contract civil and maritime, and for extra services rendered" to the vessel libelled and her crew, will not prevent such claim from being regarded as one for salvage, if it appears, from the general scope of the several allegations of which the libel is composed, that such is in reality the character of the claim.

Where three sets of salvors at different times rendered services to a vessel during a continuous peril, each was held entitled to compensation, although the separate service of either would not alone have saved the vessel in distress.

Where three sets of salvors contributed in rescuing a vessel from peril, which vessel with her cargo was valued at \$70,000, the joint value of the several vessels engaged being \$181,000, and the whole time employed some fifteen days, the amount of salvage decreed to all the salvors was \$18,000, of which sum \$5,200 was decreed to the libellants in this case, it appearing that their vessel was worth \$85,000, and that she was employed some thirteen days in the service.

THIS was a suit in admiralty, in a cause of contract civil and maritime, and of extra services rendered by the steamer R. B. Forbes to the bark Island City and her crew; and was removed into this court pursuant to the act of the 3d of March, 1821, on the certificate of the District Judge that he was so concerned in interest as to render it improper for him, in his opinion, to hear the cause. The bark Island City left Galveston on the 10th of December, 1856, laden with cotton and hides, and bound on a voyage to Boston. She made Cape Cod on the 18th of January, 1857, in a snow-storm, when the master, finding that he could not get by the Cape, kept off, and ran into the Vineyard Sound, and, at four o'clock in the afternoon, anchored within six miles of Bass River. At ten o'clock in the evening, finding that his ground-tackle would not hold, he cut away the masts, and at

daylight next morning found himself near the Horse Shoe. One anchor was gone; but the master supposed the other was still attached to its cable. On the morning of the 19th the gale began to diminish, and the bark remained without material change till the evening of the 21st, when she was hailed by the schooner Kensington. The Kensington was requested to tow the bark into Hyannis, when it was discovered that the bark's other anchor was gone. The bark was taken in tow by the schooner, and they proceeded about three miles toward the harbor of Hyannis; then, at eleven o'clock, bent another anchor to the chain, and came to anchor, on account of there being no wind. At one o'clock, on the morning of the 22d, finding it was commencing to snow, and the wind increasing, they got up the anchor, and proceeded about eight miles toward the harbor; but at four o'clock were obliged to anchor again, on account of the ice and the severity of the weather. At seven o'clock they again got up the anchor, when the bark drifted astern and the hawser parted, and efforts to again make fast proved fruitless. At eight o'clock the bark came to anchor in four and a half fathoms of water, with a hundred fathoms of chain out; and the schooner left her, with an agreement to telegraph to her owners, in Boston, and to return. The despatch was sent; but the schooner was unable to return, on account of the ice and severe weather. Upon receipt of the intelligence contained in the despatch the owners of the bark sent the steamer R. B. Forbes to her relief; and on the 23d of January she was found where she had been left by the schooner. The steamer took the bark in tow, and proceeded toward Hyannis till about dark, when both vessels came to anchor about a mile outside of the harbor. At daylight the next day, finding it impracticable to get into Hyannis, on account of the ice, it was decided to go to Provincetown to procure a supply of provisions and coal. After having towed the bark about nine miles toward Provincetown it was found the steamer could make no headway against the tide and ice, and both vessels came to anchor. Six hours later the anchors were got up, and the steamer, with the bark in tow, started to make the east channel, and towed all night. Mon-

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day morning, the 26th of January, at six o'clock, both vessels grounded on Great Point, in the northerly part of Nantucket, and there remained about two hours, till the tide rose, when they floated off, and the steamer again commenced towing the bark. In consequence of the quantity of ice, but little progress was made; and it was finally concluded that there was not sufficient coal on board the steamer to enable her to get the bark to Provincetown. The bark was anchored, and the crew went on board the steamer, which proceeded to Provincetown to procure a supply of provisions and coal, intending to return the following morning. On reaching Provincetown it was found that no supply of suitable coal could be obtained until the following Friday, when a quantity arrived from Boston. As soon as the coal was placed on board, the steamer started for the bark, and reached the place where she had been anchored about eight o'clock on Saturday, but found that she was gone. Saturday was spent in search of the bark, and on Sunday she was found at Hyannis, in possession of the officers and crew of the steamer Westernport, who claimed salvage compensation for bringing her into Hyannis; and who alleged that the Westernport, on the 30th of January, while on a voyage from New York to Boston, discovered the bark, dismasted and apparently deserted, whereupon she changed her course and bore down for the bark, which was, after great difficulty, boarded and found abandoned, — having out an anchor weighing only eight hundred pounds, the chain not fastened on board, nearly all paid out and constantly rendering around the windlass; that, after twenty-four hours' labor and exposure, the bark was brought safely into the harbor of Hyannis; they also alleged that the steamer was in peril by coming in contact with the bark. On Tuesday, the 3d of February, the master of the Forbes, having received intelligence that the owners of the bark had given bond to pay such legal claim, if any, as the Westernport might justly have demanded, took possession of the bark, and arrived with her in Boston Harbor, February 6th.

Libels were filed by the owners of the R. B. Forbes, by those who were on board the schooner Kensington, and the owners of the steamer Westernport.

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J. D. Bryant, proctor for libellants.

The assistance rendered to the bark is to be regarded as an entire one, and as such constitutes a salvage service.

The assistance rendered by the *Kensington*, taken by itself alone, did not constitute a salvage service. It must be successful, and by it the vessel assisted must be taken from danger to safety. *The India*, 1 Wm. Rob. 408; *Brig Dodge Healy*, 4 Wash. 651; *Hand v. The Elvira*, Gilpin, 66; *The Emulous*, 1 Sumn. 207; *The Henry Ewbank*, 1 Sumn. 416; *The Independence*, 2 Cur. 355.

The *Westernport* could only come in as a salvor, if at all, by engrafting her service on that previously rendered by the *Kensington* and the *R. B. Forbes*.

1. What shall the compensation be for this service?

2. How shall the compensation be divided among the different libellants?

1. As to the elements to be considered in fixing compensation. *The Wm. Beckford*, 3 C. Rob. 355; *The Clifton*, 3 Hagg. 121; *The Industry*, 3 Hagg. 204; *The Traveller*, 3 Hagg. 370; *The Boston and Cargo*, 1 Sumn. 328; *The Versailles*, 1 Cur. 361; *The Sarah*, 1 C. Rob. 312, n.; *The Hector*, 3 Hagg. 95.

2. The fact that the *Forbes* went to the assistance of the bark, at the request of her owners, introduces no different rule as to her compensation. *The Wm. Lushington*, 7 Notes of Cases, 361; *The Centurion*, Ware, 482; *The H. B. Foster*, 1 Abb. Adm. R. 229; *Bearse et al. v. Three Hundred and Forty Pigs Copper*, 1 Story, 325.

The *Forbes* took the bark from a place of danger. As to higher rate of compensation for salvage service rendered by steamers than by sailing vessels. *The Raikes*, 1 Hagg. 246; *The Adventure*, 3 Hagg. 153; *The London Merchant*, 3 Hagg. 395; *The Perth*, 3 Hagg. 415.

When steamers go out of port for the express purpose of rendering aid. *The Graces*, 2 Wm. Rob. 294; *The Pickwick*, 20 Eng. L. & Eq. 630.

The *Island City* was not derelict when found by the *Westernport*. *Tyson v. Prior*, 1 Gall. 133; *The Aquila*, 1 C. Rob.

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41; *The Beaver*, 3 C. Rob. 293; *The Barefoot*, 1 Eng. L. & Eq. 661; *The Bee*, Ware, 344; *Rowe v. Brig* —, 1 Mas. 374; *The Boston*, 1 Sumn. 330.

The services of the Westernport were not needed and were not rightly undertaken.

The law is jealous in maintaining the rights of original salvors. *The Charlotta*, 2 Hagg. 364.

The right of possession once obtained was not lost by temporarily leaving the wreck. *The Amethyst*, Davies, 23. See *The India*, 1 Wm. Rob. 408.

In order to justify the interference, the Westernport must show an absolute necessity therefor. *Hand v. Elvira*, Gilpin, 67; *The Maria*, Edwards, 177; *The Blenden Hall*, 1 Dod. 418.

B. R. Curtis and *William Dehon*, for claimants.

CLIFFORD, J. All the evidence tends to show that the peril was continuous from the first moment, when the schooner went to the relief of the bark, down to the time when the steamer Westernport anchored her in the port of Hyannis, in a condition so crippled and disabled by the disaster she had encountered that the service of the other steamer was indispensable to get her into Boston, where she was bound. She was in very great peril when relieved by the schooner, and was by her placed in a position of far less exposure. Those on board the schooner were prevented from doing more by the violence of the storm, and from returning to complete the service, by causes beyond their control. They rendered important service in changing her position, and in transmitting intelligence to her owners, and in giving them the opportunity of sending forward more efficient aid. Valuable services were also rendered to the bark by the steamer R. B. Forbes, in placing her in a position of still greater safety, where, if her only remaining anchor had been of sufficient weight, there is much probability she might have ridden out the storm, till the steamer with her own crew had returned. Her exposure, however, was still very considerable, considering the state of the weather, on account of the well-established fact that the anchor was not of sufficient weight. Two of her anchors had previously been lost, and the one remaining was the

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stream anchor, weighing but eight hundred pounds, which, in view of the size of the vessel and her lading, was clearly insufficient to justify the conclusion that the bark was out of danger in the rough weather which followed. Floating ice still remained in the Sound, and for a considerable portion of time there was a heavy sea. Under those circumstances she was certainly liable to have drifted away, during the gale of the succeeding night. While these considerations lead necessarily to the conclusion that the Westernport rendered valuable service to the bark, it by no means follows that the bark was derelict, as is contended by the counsel for that steamer. On the contrary, it appears that the steamer R. B. Forbes left the bark where the steamer found her, with the intention of returning, and the same remark applies to the crew of the bark, and it is not perceived, from the evidence, that the officers and crew of the steamer omitted any precaution in their power to take to leave the vessel in a safe position, or that they were guilty of any negligence in their efforts to return. Their right to salvage compensation is resisted by the counsel of the Westernport upon two grounds, which may as well be considered at the present time as in any other stage of the controversy.

It is said, in the first place, that the service was rendered under contract with the owners of the bark, and therefore was not a salvage service. Intelligence was communicated to the owners of the bark, by the master of the schooner on his return to Hyannis, that the bark was still in peril, and needed assistance. He performed that service at the request of the master of the bark, and the result was that her owners immediately telegraphed to Provincetown, where the steamer was then lying, requesting her master to go to the relief of the bark, and in pursuance of that request he went, and found her where she had been left by the schooner. No contract of any kind was made between the parties, except what may be implied from that request, which created no more obligation upon those on board the steamer to undertake the service than a signal of distress from the bark would have created, if it had been seen from the shore. They were at perfect liberty to go or to decline to go, as they saw fit,

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and if they had refused, either from interest or choice, the owners of the bark would have no right of action on account of the refusal. Such a service is entitled to be rewarded, under the conditions and according to the measure of the maritime law; as the claim stands upon request to the master of the steamer to go to the assistance of the bark, a compliance with that request, and the performance of a service which is salvage in its incidents and nature. All the cases show that the relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property from such peril, constitutes a case of salvage; and where the compensation is not fixed by such a contract as a court of admiralty will enforce, it is to be adjusted according to those liberal rules which form a part of the maritime law. In order to bar a claim for salvage, there must be a distinct agreement proved between the parties for a given sum. It is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril, which determine the question whether or not the case is one of salvage; and it has been determined that, to bar a claim of this description, it is necessary to allege and prove that a binding contract was made to pay for the service at all events, whether the property be lost or not. *The Versailles*, 1 Cur. 355; *The William Lushington*, 7 Notes of Cases, 361; *The Centurion*, Ware, 490; *The H. B. Foster*, Abb. Adm. R. 229; *The Independence*, 2 Cur. 357.

Another objection to the right of the steamer R. B. Forbes to recover salvage compensation arises from the pleadings. It is insisted that the libellant does not make any such claim in the libel. That view of the libel is derived chiefly from the fact that is alleged to be in a cause of contract civil and maritime, and of extra services rendered to the bark and her crew. Standing alone, that clause would furnish some support to this argument. Such, however, is not the fact, and the character of the claim set

forth in the libel must be determined by the general scope of the several allegations of which it is composed. What is meant by contract and extra service is clearly and fully explained by the libellant, in the first and second articles of the libel, and also in the last. He alleges, in the first article, that the steamer was at Provincetown on the 23d of January, 1857, and that her master on that day received a letter from the owners of the bark, stating that she was adrift near the light-boat, off Hyannis, and requesting him to go with the steamer to her aid. In the second and succeeding articles, to the fourteenth inclusive, he states the nature and character of the service rendered, and it will be sufficient to say that the statements of the pleadings conform substantially to the proofs of the case, as they are exhibited in the record. After describing the service, the libellant alleges that, by reason of the perils incurred, and the great importance, nature, and value of the service, the owners of the steamer are entitled to, and reasonably ought to have, and do claim, an extra liberal compensation by way of reward therefor, commensurate with the service, its duration and risk. These allegations are sufficient in point of law, and constitute a proper legal foundation for the claim set up by the libellant at the hearing. That claim is warranted by the pleadings, and is fully sustained by the testimony. Every suggestion that the suit is collusive is sufficiently answered by the fact that the proposition does not find any support in the evidence. It was based chiefly upon the assumption, that some one or more of the underwriters upon the bark owned some interest in the stock of the company to which the steamer belonged. Suppose it were so, it could not avail as a defence in this suit, as it would only show a partial and contingent interest in the property saved, which could not have the effect to disqualify the owners of the steamer, as a corporation, from performing a salvage service, and claiming therefor a salvage compensation. Whether it would or would not be otherwise in a case where the owners of the stock in the steamer and the insurers were the same, or substantially the same in interest, it is not necessary to decide, as there is no satisfactory proof to sustain that view of the present case. *The Pickwick*, 20 Eng.

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L. & Eq. 636. All the evidence shows that the bark was dismasted on the 18th of January, 1857, and that she remained in peril more or less imminent, until she was finally carried into the port of Hyannis by the steamer Westernport, and anchored near the wharf. It was a continuous peril; and as each of these vessels rendered valuable service to the bark, and contributed to her relief and safety, each is entitled to salvage compensation. According to the testimony, the Kensington was a schooner of one hundred and eighty-one tons' burden. She was worth about six thousand dollars, and her cargo on board, together with freight and outfits, were worth about twenty-five hundred dollars; making in all some eight thousand five hundred dollars. Her exposure was very considerable, and the service was entirely voluntary. She had nine men on board, and was employed in the service some twenty-four hours. Thirteen days were spent by the steamer R. B. Forbes, from the time she started on the enterprise up to the time she arrived with the bark at her place of destination. Some portion, however, of the time was virtually lost, while she was lying in the respective harbors of Provincetown and Hyannis, waiting for coal, or for the completion of the arrangements by which she gained possession of the bark. She is valued at eighty-five thousand dollars, and is usually employed in towing vessels on the coast, and it appears that the demand for towing at that time was very great. All the facts necessary to be considered in this connection, in the case of the Westernport, have already been stated, and need not be repeated. Considering the nature and duration of the service by the several parties, and the value of the property saved, together with the value of the property employed in the several undertakings, and the danger to which the whole was exposed, and the energy and perseverance displayed in saving the bark, her cargo and crew, it is believed that the property saved ought justly to pay a salvage compensation of thirteen thousand dollars, as the entire amount to all concerned. Of that sum five thousand two hundred dollars are decreed to the libellants in this case. Should any question arise as to its apportionment among the owners, officers, and crew, the parties will be heard when the case comes up for a final decree.

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JOHN NORRIS *et al.* v. THE BARK ISLAND CITY AND CARGO.WILLIAM C. NORTON *et al.*, Petitioners, v. THE SAME.

A dismasted bark, without rudder, having no anchor attached to her chain, in a severe storm, was taken by a schooner to a safer position and there left; and upon the arrival of the schooner in port, intelligence of the condition of the bark was transmitted to the owners. The bark was saved by another vessel. *Held*, that the services of the schooner entitled her to a liberal compensation.

The duration of the schooner's service was twenty four hours; her value, with her cargo, \$8,500; the vessel relieved by her was worth \$70,000. Salvage compensation decreed to libellants and petitioners in this case, \$8,800.

THIS was a libel claiming salvage compensation for services rendered by the schooner Kensington to the bark Island City, and was, like the preceding case, certified to this court. The nature of the service is sufficiently set forth in the report of that cause. A few days after the libel was filed, William C. Norton *et als.*, as owners of the schooner, filed their petition to become parties to the libel. It appeared that the Kensington was worth about \$8,500.

H. A. Scudder, for Norris *et als.*, cited *The Henry Ewbank*, 1 Sumn. 400; *Tyson v. Prior*, 1 Gal. 133; *Rowe v. Brigg*, 1 Mas. 372; *The Aid*, 1 Hagg. 84; *The London Merchant*, 3 Hagg. 395; *The Emblem*, Daveis, 61.

Hutchins and *Wheeler*, for Norton *et als.*

The salvage service of the Kensington was effectual and complete. The bark was taken from a position of the greatest danger to a place where she securely remained until taken in tow by the Forbes. But for the Kensington she would not have been saved.

Sending the telegraphic despatch was a salvage service. *The Ocean*, 2 Wm. Rob. 92.

The Kensington and her crew were the principal original salvors, and their rights should not be impaired by the conduct of those on board the Forbes in placing the Island City a second time in a place of peril.

Success is not absolutely necessary to entitle salvors to compensation; if they contribute to success, they are entitled to salvage.

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As to amount of salvage to be allowed in the case, 3 Kent's Com. (5th ed.) pp. 245, 246, note *b*; *Mason v. Ship Blaireau*, 2 Crau. 240; *Tyson v. Prior*, 1 Gal. 132; *Bond v. Brig Cora*, 2 Wash. 80.

. *B. R. Curtis* and *William Dehon*, for claimants.

CLIFFORD, J. Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. When the property is not saved, or if it perish, or, in case of capture, is not retaken, no such compensation can be allowed. A different principle, however, applies when the property is actually saved, and more than one set of salvors have contributed to the result. In such cases, all who have engaged in the enterprise, and have materially contributed to the saving of the property, are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered. Applying these principles to the case under consideration, it is impossible to say that the schooner did not materially contribute to the saving of all the property which constitutes the subject of controversy at the present time. All the evidence shows that the bark, when she was relieved by the schooner, was in great peril. She was dismasted and without any rudder, and was in fact lying without any anchor attached to her chain. Lying in that condition in a severe storm, she was relieved by the voluntary efforts of the officers and crew of the schooner, placed in a safer position, and intelligence transmitted to her owners. These were valuable services, and fully entitled those who performed them to a liberal compensation. Considering that the duration of the service did not much exceed twenty-four hours, and that the value of the schooner and her cargo was much less than that of either of the steamers, her share of the amount allowed as salvage ought to be less. It has already been determined that the property is liable to pay a salvage compensation to the amount of thirteen thousand dollars. Of that amount the libellants and petitioners in this case are entitled to

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the sum of three thousand three hundred dollars, to be apportioned one third to the owners of the vessel, and the remaining two thirds to the officers and crew.

HENRY B. CROMWELL *et al.* v. BARK ISLAND CITY AND CARGO.

A disabled bark in tow of a steamer was anchored and left for a necessary and temporary purpose. The officers and crew of the bark went on board the steamer; but nothing was taken out of the bark, it being the intention to return and take her to a place of safety at the earliest practicable moment, which intention was carried into effect. *Held*, the bark was not derelict when found by another vessel, during the steamer's absence.

But when a party finds property thus temporarily left, whether from necessity or other cause, and he takes possession of it with the *bona fide* intention of returning it to the owner, and if by his exertions he contributes materially to the preservation of the property, he will be entitled to remuneration as a salvor, according to the merits of the service.

In this case the vessel saved was, with her cargo, worth \$70,000; the steamer that rendered the service, with her cargo, \$90,000. Salvage decreed to the owners of the steamer, \$1,500; and in the absence of any charge of embezzlement or theft, \$8,000 would have been adjudged to the officers and crew.

But where all, or nearly all, the personal effects of the officers and crew of the bark saved were embezzled, locks being broken, chests and trunks forced open, and these acts of plunder committed by the crew of the rescuing steamer, under circumstances which showed that her officers either connived at them, or were grossly negligent in failing to prevent them, and in not causing the property to be restored. *Held*, that the salvage that would otherwise be decreed to the officers and crew of the steamer was forfeited to the owners of the property saved.

THIS, like the two preceding cases, was a libel claiming to recover for a salvage service, and was also certified to this court.

The circumstances under which the service was rendered appear in *Joseph H. Adams et als. v. Bark Island City, ante*, p. 210.

It appeared in this case, that, after the bark was taken into a place of safety, the crew of the steamer Westernport were allowed to break open the chests of seamen and officers of the bark, and take out their contents, which consisted of clothing, money, and other articles.

R. H. Dana, Jr., and *Daniel W. Gooch*, for libellants.

The elements necessary to constitute salvage: 1. A marine peril; 2. Voluntary service upon contingent compensation; 3.

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Success. *The Henry Ewbank*, 1 Sumn. 416; *The India*, 1 W. Rob. 406; *The Dodge Healy*, 4 Wash. 651.

The services of the Kensington's crew had the two former requisites, but failed in the last.

As to the R. B. Forbes, there is no claim for salvage. She was engaged by the owners of the Island City, in their service, and subject to their order. The employment of the Forbes could have been terminated at any moment by the owners of the bark. The libel of the Forbes is solely to obstruct the claim of the Westernport. The service of the Westernport was salvage in its nature.

The Island City was derelict in the sense of the law of salvage. In the salvage laws, derelict means deserted, with or without the hope of returning. The test is the power of resuming possession. *The Amethyst*, Daveis, 20; *John Gilpin*, Olcott, 77; *John Wurtz*, Olcott, 470, 471; *Rowe v. The Brig*, 1 Mas. 373.

In cases like this the rule is to give one half for all the salvage. *The Boston*, 1 Sumn. 328; *Sprague v. Barrels Flour*, 2 Story, 195; *The Galaxy*, 2 Bl. & Howl. 270; *L'Esperance*, 1 Dod. 45; *The Frances Mary*, 2 Hagg, 90; *The Elliotta*, 2 Dod. 75; *The Reliance*, 2 Hagg. 91; *The Eugene*, 3 Id. 156; *The Effort*, Id. 166; *Zwei Gebroeders*, Id. 431; *The Watt*, 2 Wm. Rob. 70; *The Nicolina*, Id. 165; *The Britannia*, 3 Hagg. 154.

Reasons for high rate of salvage in this case: —

1. The vessel saved was derelict.

The service was solely by libellants.

She was in immediate peril.

Service was successful.

Salving vessel was a steamer. *The Gen. Palmer*, 5 Notes of Cases, 159, n.

Chances of reasonable relief from other sources was small.

The articles taken from the Island City by the men of the Westernport were so taken to protect themselves from the severity of the weather.

If the Forbes was not acting as agent of the owners of the Island City, then she was a mere trespasser on the Kensington's possession.

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B. R. Curtis and *William Dehon*, for claimants.

CLIFFORD, J. On this state of facts, it has already been determined, in the case of *Adams v. The Bark Island City*, that the steamer is entitled to a salvage compensation. Her counsel, however, insist that the bark was derelict, and that the amount of the compensation to be allowed should be ascertained upon the principles applicable to cases of derelict. Reference to the facts, as already stated, will show that the theory of fact assumed by the counsel cannot be sustained. When the officers and crew of the steamer anchored and left the bark, it was with the openly declared intention of returning, and the same remark applies to the master of the bark and her crew. They left for a necessary and temporary purpose, with the intention of returning, and actually carried that intention into effect at the earliest practicable moment. Suffice it to say, without repeating the testimony, that their efforts in that behalf were unceasing from the moment they reached Provincetown, where it was expected they would find suitable coal, until they finally returned. One great cause of danger was the ice, and no doubt is entertained, from the evidence, that the place where the bark was left by the R. B. Forbes was one less exposed in that respect than the one she previously occupied. She was left in as safe a condition as the means at hand would allow. No more could have been done had her crew remained, and as they were destitute of provisions, or nearly so, it was not an unreasonable step on the part of the master to allow the crew to accompany the steamer to Provincetown. Property is not in the sense of the law derelict, and the possession left vacant for the finder, until the hope of recovering it is gone, and the intention of returning is finally given up. But when a party finds property thus temporarily left to the mercy of the elements, whether from necessity or any other cause, and he takes possession of it, though it is not finally abandoned and derelict, with the *bona fide* intention of saving it for the owner, he will not be treated as a trespasser. On the contrary, if by his exertions he contributes materially to the preservation of the property, he will entitle himself to a remuneration as a salvor, according to the merits of the service ren-

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dered. *The Bee*, Ware, 345. It is not enough that the officers and the crew left the vessel, unless it also appears that she was so left without any intention on their part of returning to the vessel. *Tyson et als. v. Prior*, 1 Gall. 133. To constitute a case of derelict, it is not sufficient that the vessel was abandoned, but it should also appear that the abandonment was without the hope of recovery, and without the intention of returning to the vessel. *The Aquila*, 1 C. Rob. 41. All the cases show that the mere quitting of the ship, for the purpose of procuring assistance from shore, and with the intention of returning to her, is not an abandonment. *The Beaver*, 3 C. Rob. 293; *The Barefoot*, 1 Eng. L. & Eq. 661; *The Emulous*, 1 Sumn. 209; *The Boston*, 1 Sumn. 336. Unexpected difficulties and delay had been encountered by the steamer, and her master finding that his coal was nearly consumed, and that the crew of the bark were destitute of provisions, concluded to go to Provincetown after supplies, and the officers and crew of the bark decided to go in the steamer, it being fully understood that all would return to the bark at the earliest practicable moment. Intention to return in this case is fully proved, and as a matter of fact was actually carried into effect without any previous knowledge that the bark had been removed from the place where she had been left by the steamer and her own crew. These considerations lead necessarily to the conclusion that the proposition that she was derelict cannot be sustained. Compensation, therefore, in this case, must be ascertained by the same rule and upon the same principles as have been applied in the other cases already decided which grew out of the same disaster. Thirteen thousand dollars is the whole amount allowed as salvage, and of that sum five thousand two hundred dollars have been adjudged to be the proportion to be paid in the case of *Joseph H. Adams v. The Bark Island City*, and three thousand three hundred dollars in the case of the schooner Kensington. Deducting these sums from the whole amount allowed, it leaves four thousand five hundred dollars which remains to be adjusted in the case under consideration. One third of that sum is hereby adjudged to the owners of the steamer, leaving the sum of three thousand

dollars, which, in the absence of any charge of embezzlement, theft, wanton destruction of the property saved, and gross carelessness, would be adjudged to her officers and crew.

But whatever salvage may have been earned by the master, officers, and crew of this steamer, it is insisted by the respondents, was forfeited by embezzlement and by gross negligence. That embezzlement of the most censurable kind, such as robbing the chests of shipwrecked mariners, actually took place is clearly proved, not merely in a single instance, but extensively, and upon a plan of general plunder of their effects. The master of the bark first went on board, after his return from Provincetown, on the 1st of February. She was then in possession of the crew of the Westernport. On going into the cabin he found a trunk broken open which was on freight. It contained a few clothes and papers, and was filled with pecan-nuts, and similar nuts were scattered all about the cabin. He then went ashore; and on returning and looking round, he found that all his clothes were gone. Complaint was then made to the mate of the steamer, and most of the articles were returned. When he left the bark to go to Provincetown his chest contained sixty-five dollars in money, and that also was gone. Of that sum twenty-five dollars were returned by the mate. Forty-two dollars, belonging to his sister, he says, was rolled up in a newspaper, and there was alongside of it in the till of his chest his purse, containing twenty-three dollars in gold and silver. That purse and its contents were gone, and were not returned. His loss, in addition to the money already mentioned, he estimates at ten dollars, consisting, among other things, of a dozen and a half of socks, his razor, a pair of flannel drawers, and two or three silk handkerchiefs. Several of the seamen were also examined, and they also testify that their chests were broken open and pillaged of their contents. One of them, George Patten, testifies that he had forty-three dollars in money in his chest, and that when he went on board he found the chest broken open and the money gone. Other things had been taken from the chest, such as a quadrant, his coat, socks, drawers, and other small articles. Twenty-four dollars and

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fifty cents of the money were returned to him by the mate in about two hours after he went on board. He says that the chest of the master, the trunk of the mate, the chests of two of the seamen in the forecastle, and the chest of the carpenter, were also broken open. After ascertaining what had been done, he complained of his loss, first to the mate of the bark, and then to the engineer of the steamer, and that the latter promised him to return what articles they had in their possession. Some of the articles of clothing were returned to him by two of the crew, and the mate gave him back the quadrant. His loss in money and clothing amounts to twenty-five dollars and fifty cents. Others also were robbed of their effects in the same way, and among the number was the mate of the bark. He estimates his loss at seventy-five or eighty dollars, consisting for the most part of articles of clothing, and including his watch, razors, clothes-brush, and some books. Some of the articles he saw on board, and he also says that the mate of the steamer told him that he took the quadrant and barometers of the ship, and such things, himself. Another seaman, Hiram Wallis, testifies that his chest was split and broken open, and everything taken out. His loss was twenty dollars, chiefly in articles of clothing, and exclusive of what was returned. Some of the seamen had no chests, and left their clothing in the bark, as they had been in the habit of keeping it, in carpet-bags. Those also were rifled and robbed of their contents. Charles McCarty testifies that he lost all of his clothing, valued at twenty dollars, and none of it was returned. He complained of his loss, and was told by two of the crew of the steamer that the mate went down first into the forecastle, and broke open the chests, and took out what he thought was worth taking, and that the crew afterwards followed him. Clothing was also lost by Isaac McGowan, another seaman, to the amount of twenty dollars, and he says he heard the mate of the steamer acknowledge that he had overhauled the chest of the master of the bark. Another seaman, by the name of John Williams, also lost clothing and other articles of the value of thirteen or fourteen dollars, and he says that the chests, when he went on board at Hyannis, were all broken open, and every-

thing was taken out of them. He also says that two of the crew of the steamer told him that the mate and engineer of the steamer went down first into the forecastle, and when the crew got there the chests had been broken open. Two of the seamen of the bark were taken sick at Provincetown, and did not return. They were both examined as witnesses, and each testifies that he had lost some seventeen or eighteen dollars in clothing, and such other articles as are usually kept by seamen in their chests.

These references to the testimony are believed to be sufficient to show that a general plan of embezzlement, so far as respects the effects of the officers and crew of the bark, was actually practised by the crew of the steamer, and that the mate and other officers in charge of the property saved either participated in the robbery, or were so grossly negligent in the performance of their duty to protect it against such practices as to render them equally culpable. When the bark was anchored near the wharf, the master of the steamer was on board, and he admits that he remained there until he set the watch, and then he went on shore to visit his family. His duty plainly required him to prevent such open violation of law by those under his command, and it is not doubted that the mate and other officers and crew might have been restrained if he had exercised proper diligence in enforcing the authority with which he was invested. Whether the chests were broken open before or after he went on shore does not very clearly appear. One thing, however, is certain, little or no effort was made on the part of the master of the steamer to cause restitution to be made after he returned, and there is much reason to infer from the evidence that the depredation had been commenced before he left the vessel. As a master mariner, he well knew that the seamen, shipwrecked as they were in midwinter and in weather of almost unparalleled severity, were in need of all their clothing, and his failure to exert himself to cause it to be restored adds something to the other grounds of inference that he was guilty of gross negligence in suffering this outrage to be committed. Open embezzlement, such as was practised in this case, stands upon a somewhat different principle in that behalf from secret theft. Orders from

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the master, however strict, might not prove sufficient to prevent the latter, while they would in general be an ample safeguard against the former. According to the testimony, the master of the steamer admitted in effect that he expected pilfering, and yet he took no measures to guard against it; and when complaint was made, and he found that his expectations had been realized, he was indifferent to the calls for redress. All of the crew who did not actively participate in the plunder, if any such there were, must have been aware that it had taken place, and it was the imperative duty of every man to have exerted himself to have it restored; and in this respect they were guilty of culpable negligence and wilful default. Considering that so brief a period had elapsed after the bark was anchored at the wharf before the officers and crew of the bark arrived, it is scarcely possible that the money had been expended or the property consumed. And if not so, then it might have been returned. No discrimination, therefore, can be made in favor of any one of the officers or crew, and the claim of each salvor must abide the conclusion to be drawn from the general conduct of the whole company. Salvage property is always from necessity more or less exposed to be plundered by the salvors, and when found unoccupied, whether derelict or otherwise, it is peculiarly so, because the owner then, being absent, has no power to protect it, either by himself or his agents. Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. Those liberal rules as to remuneration were adopted and are administered, not only as an inducement to the daring to embark in such enterprises, but to withdraw as far as possible every motive from the salvors to depredate upon the property of the unfortunate owner. While the law is thus liberal as to compensation, it requires on the part of the salvors the most scrupulous fidelity. It visits, says a learned judge, any embezzlement, although small, with an entire forfeiture of all claim for salvage. It not only withholds the extraordinary reward allowed to the

honest salvor as a premium for his courage and hardihood, but, by way of penalty for his fraud, deprives him even of a *quantum meruit* for his labor. *The Rising Sun*, Ware, 387; *The Duke of Manchester*, 2 W. Rob. 478; *The Barefoot*, 1 Eng. L. & Eq. 661. While the general interests of society require that the most powerful inducements should be held out to men to save life and property about to perish at sea, they also require, says Chief Justice Marshall, that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects preserved. *Mason et als. v. The Blaireau*, 2 Cran. 240. Judge Story held, in the case of *The Schooner Boston*, 1 Sumn. 341, that compensation for salvage service presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors. Salvors are required by the nature of their undertaking, and by a due consideration of the large award allowed them for their services, to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved; and if they are guilty of embezzlement, whether at sea, in port, or even after the property is delivered into the custody of the law, it works a forfeiture of their claim to salvage. When secret, and purely an individual act, it is justly held not to prejudice co-salvors who are innocent. But all may become guilty by consenting thereto, or by connivance, concealment, or encouragement afforded to the actors, or by not preventing the act when it is in their power. Apply these principles to the facts of the case as already ascertained, and it is obvious what the decision must be. All, or nearly all, of the personal effects both of the officers and crew of the bark were embezzled within a few hours after she was anchored at the wharf. Locks were broken, chests and trunks forced open, clothing, money, and other articles of value to the mariner carried away and never returned; and these acts of plunder were committed under circumstances which, within the principles here laid down, implicate all of the officers and crew of the steamer, and therefore render all responsible for their commission. For these reasons it is adjudged that the entire portion of the salvage com-

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pensation allowed in this case, which would otherwise be due to the officers and crew of the steamer, be considered as forfeited to the owners of the property saved.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1859.

GEORGE B. COFFIN *et als.* v. THE SCHOONER JOHN SHAW AND CARGO.

The failure of libellants to refer their claim for salvage, as agreed, was held, under the circumstances of this case, to be no bar to the suit, and could only be taken into the account as evidence to reduce the amount which libellants were entitled to recover.

Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim.

Obiter. A proposition by salvors that, in case they were unsuccessful in raising the vessel, they should have the privilege of stripping her, being made in advance of any effort by them to save the vessel, was highly objectionable, and must be regarded as detracting very materially from the merit of their service.

That the risk was slight, and the duration of the salvage service comparatively brief, affect the value of the same, and the amount to be allowed, but cannot be a bar to the claim.

THIS was an appeal in admiralty. The libel set forth that the schooner John Shaw, laden with hard-pine timber, and of the burden of about one hundred and sixty tons, was wrecked on the 12th of August, 1858, and in peril of being entirely lost on the high seas, west of Nantucket, near Nantasket; that the master and crew requested the libellants to assist in saving the vessel and her cargo; that, at the risk of their lives, they commenced their efforts to save the vessel, and for forty-eight hours, during the most of which time a violent gale was blowing, and the sea running high, they continued their exertions, and finally succeeded in bringing the schooner and most of her cargo safely

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into the harbor of Edgartown, in the district of Massachusetts. It was further alleged, that without the aid of the libellants the schooner and her cargo would not have been saved, as she was in a dangerous position, with no anchors out, and her master and crew were throwing overboard the cargo for the purpose of lightening the vessel.

The claimants of the schooner and cargo both filed answers to the libel. These answers were in substance the same. That the schooner was wrecked, or in danger of being lost, or was unmanageable, or that her master requested the assistance of the libellants, were denied in both answers. It was further set up in the answers, that the schooner was not near any reefs or breakers; that the water was of sufficient depth between the shoal on which she was aground and the land to float the vessel; that no signals of distress were set; and that the schooner was not considered by her master in peril of being lost. The answers alleged that the libellants assisted in anchoring the schooner and getting her off under a contract, and that the libellants volunteered their services, which were in the first instance declined by the master, but were afterwards received upon condition that their compensation should be estimated by two referees, one to be chosen by the master of the schooner, and the other by the libellants. All the allegations of the libel concerning the violence of the wind and the condition of the sea were also denied, and it was alleged that the crew of the schooner shared in the labor and service performed by the libellants. The loss of twenty-three thousand feet of lumber, with which the schooner was loaded, was set forth; denial of any salvage service by the libellants was made, and the willingness of the respondents to account with the libellants, and pay them such sum as might be due, subject to any claim of respondents for the loss of lumber by the act or default of libellants, was averred in the answers.

In the District Court a decree was entered for the libellants in the sum of ninety dollars, to be equally divided among them, and for a further sum of twenty dollars to one of said libellants for the loss of his boat, without costs.

Horace Webster, proctor for libellants.

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W. H. Y. Hackett, proctor for claimants.

CLIFFORD, J. According to the testimony, the schooner sailed from Savannah, in the State of Georgia, bound on a voyage to Portsmouth, in the State of New Hampshire. She was a vessel of about one hundred and fifty-six tons' burden, with a company of five men, consisting of the master and mate, two foremast hands, a cook, and steward. They had on board a cargo of hard-pine timber, measuring about one hundred thousand feet. It filled the hold of the vessel, and there was about thirty-five thousand feet on the deck. On the 11th of August, 1858, about ten o'clock at night, the schooner ran on to a sand shoal between Maskeget and Tuckernuck Islands, and stuck fast at a point where the water at low tide is about six feet deep. After the vessel struck, she swung round stem off, heading south-southwest. Her master then trimmed her sails accordingly, and she remained in that position until the following morning. In the mean time he began to get off part of her deck load, supposing that he was on a reef at the new south shoal, and thinking that, by lightening the vessel, she might pass over the shoal as the tide rose. He threw over three sticks of hewn timber of about a thousand feet each, cutting one in two pieces because it was so long that he could not otherwise get it over the rail. Two or three smaller sticks were also thrown over during the night; but finding that the vessel lay without thumping, he ordered the crew to stop heaving the timber over till daylight, when he could see what was the position of the vessel. Seven large sticks of hewn timber still remained on board, and in the morning the master renewed the direction to the crew to commence heaving it over. Shortly after this order was given, and while the crew were employed in carrying it into effect, one of the libellants came to the schooner in a boat, and inquired of the master whether he wanted assistance, and the master told him he wanted a pilot. At the time the schooner ran on to the shoal the master says he was steering north by west, as ascertained by the compass. He had determined the longitude, however, by the chronometer, which made him forty miles farther east than he really was, and it does not appear that his mistake was in

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any manner corrected until he was visited by the libellants. The master inquired of the libellant, when he first went on board, whether he was acquainted with these shoals, and whether he could pilot the vessel out. Both of these questions were answered in the affirmative, and the libellant expressed the opinion that by lightening the vessel she might be got off during that tide. They then went to work heaving over the timber from the deck, and continued to do so until the tide began to slacken. When the tide slackened, they ran out the kedge anchor about one hundred and twenty fathoms, and the master also let the larboard anchor drop. During the time they were so engaged the other seven libellants arrived in a boat from Tucker-nuck, and went on board. After some conversation, the libellant first named informed the master that they wanted fifteen hundred dollars in case they should assist in getting off the schooner, which the master declined to give. On hearing that remark of the master, five of the libellants left the schooner, and went and picked up several other sticks of the floating timber. They were absent about three quarters of an hour. Some further conversation ensued, during their absence, between the master and those who remained, which was renewed and continued after their return. As the result of these several conversations, it was arranged between the parties, as the master says, that the libellants should assist in getting off the schooner, and that they would leave the matter to two disinterested men, one to be chosen by each party, to settle the amount of the compensation, and with that understanding they went to work. Three of the libellants were examined upon this point. One of them testifies that the master, when asked the second time if he wanted assistance, answered in the affirmative, and that the arrangement was, if they got her off, and could not agree upon the amount of compensation, that they were to leave it out, and in case they failed, they were to have the privilege of stripping the vessel. Another says that the master, after the five men returned, desired them to proceed and get the vessel off, remarking, at the same time, that if they could not agree upon the price, they would leave it out. George B. Coffin testifies that the master requested them to take

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the vessel and proceed, and that they thought he could get her off, and that one of the libellants remarked that if they did not succeed they were to have the privilege of stripping her, and on these terms they proceeded in the undertaking. One of the seamen on board the schooner was also examined on this point by the respondents. He testifies that the master declined the offer first made by the libellants; but he admits that he afterwards heard him assent that they might go to work while he and one of their number went aft to converse about the terms. All the testimony shows that the master accepted the services of the libellants, and that no definite sum was agreed as the measure of compensation for the service to be performed. They finally went to work under the arrangement, and on the terms that if successful, and they could not agree as to the price, the matter should be submitted to referees, to be chosen as stated in the testimony of the master. It seems that so much of the suggestion of the libellants as contemplated the stripping of the vessel, in case they were unsuccessful, was not acceded to by the master. That proposition, made as it was in advance of any efforts on the part of the libellants to save property, was highly objectionable, and must be regarded as detracting very materially from the merit of the service. That the schooner was in some peril cannot successfully be denied. Many other vessels have been stranded on this shoal, and few had ever found effectual relief. She was fast in her position, and the efforts of her officers and crew were insufficient to work her free. The master had lost his course; and being without any knowledge that his chronometer was imperfect or out of order, it is not probable that he would have discovered his mistake without other means than those he had at hand. Part of the cargo had already been thrown overboard, and the crew had become exhausted with continued labor, and stood in need of relief. Under such circumstances it is impossible to say that the vessel was in no peril. It is no sufficient answer to this state of facts to say, even if it were true, as is supposed by the respondents, that the risk and duration of the service were less than they would have been had the elements been more threatening and unpropitious. That argument is a proper and

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forcible one as affecting the value of the service, and the amount to be allowed, but it is wholly insufficient under the circumstances of this case as a bar to the claim for salvage. Forty-eight hours or more were spent in performing the service, and during some portion of the time there was a strong tide and considerable wind. As before remarked, some portion of her deck load had been thrown overboard before the libellants arrived, and after they took charge of the schooner they found it impossible to work her off by heaving at the windlass until her deck had been nearly or quite cleared. Two boats were used in carrying out the anchors, and one or more of the witnesses testified that the anchor and chain loaded them so deep that one or two men had to bail water nearly all the time they were carrying them out to prevent the boats from sinking. All the circumstances show, not only that the vessel and cargo stood in need of relief, but that the assistance as finally rendered, at the request, or at least by the assent, of the master, was not unattended with some danger and personal risk. In the first instance, it is true that the master only requested a pilot, and declined the proffered aid, hoping, doubtless, to get his vessel off by the efforts of his own crew; but the case clearly shows that he subsequently changed his mind, and set the libellants at work. They demanded unrestricted salvage compensation, which the master refused to allow. Efforts were then made to agree upon a definite sum; but the parties could not, and did not, agree. Finding they could not agree upon a fixed compensation, it was arranged that the libellants should render the service, and, in case they disagreed, the matter was to be submitted to referees. That stipulation was never carried into effect, and each party charges the other with fault in that particular. Propositions to that effect were made on both sides, and as often as they were made they were rejected by the opposite party. As compared with the arrangement between them before the service was rendered, no one of the propositions appears to be entirely free from objection. One or more of those made by the libellants were unreasonable, and their conduct in that behalf cannot be altogether overlooked in fixing upon the amount of the compensation they are entitled

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to receive. Their failure to refer, under the circumstances of this case, is no bar to the suit, and can only be taken into the account as evidence to reduce the amount they are entitled to recover. Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim. *The Versailles*, 1 Cur. 355; *The William Lushington*, 7 Notes of Cases, 361; *The Centurion*, Ware, 490; *The H. B. Foster*, Abb. Adm. R. 229; *The Independence*, 2 Cur. 357. Some of the timber was lost, but it is not perceived that there is any sufficient evidence in the case to show that it was by the neglect or through the default of the libellants. Salvors are allowed a liberal compensation for their services for two reasons: first, as an inducement to engage in the service; and, secondly, to withdraw from them every motive of unfaithfulness in the performance of their duties. Fraud or gross negligence is visited by the law with an entire forfeiture of claim to compensation. But the burden of proof, when any such imputation is made, lies on the party making it, and when not proved, of course the charge cannot be sustained. In view of all the circumstances, I think the libellants are entitled to a salvage compensation, but less than is usually allowed in cases of this description. Five hundred dollars I think a reasonable compensation. Accordingly, the decree of the District Court is reversed, and let a decree be entered in favor of the libellants for that amount, with costs in both courts.

MASSACHUSETTS DISTRICT.

MAY TERM, 1859.

JAMES W. BADGER *et al.* v. DANIEL B. BADGER *et als.*

Where a cause in equity was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and, no objection being made thereto, the motion was granted, and the bill in equity dismissed without any hearing upon the merits. *Held*, that the record of the former suit and decree was no bar to the bill of complaint.

THIS was a bill in equity, wherein the complainant sought to recover certain alleged interests of the heirs of Daniel Badger, deceased, in certain parcels of real estate, which the complainant alleged were fraudulently obtained and wrongfully held by the first-named respondent, who was a co-heir with the complainant. The respondents pleaded a former suit and decree in bar of the bill of complaint, alleging that the former suit involved the same subject-matter as the present; that it was between the same parties; and that it was regularly disposed of, on the merits, by a final decree dismissing the bill with costs for the respondents. After this suit was commenced, the name of David Badger, one of the complainants, was stricken from the bill. The other complainant, instead of replying to the plea filed by the respondents, set it down for hearing under the twenty-third rule. Both parties were heard upon the demurrer, and the court held the plea sufficient, under the admissions of the demurrer, that the facts therein stated were true. In giving the order, however, to enter the decree, the court also gave the complainant leave to withdraw the demurrer, and to reply to this plea in bar. That leave was granted, because the plea set forth certain matters of fact which it would be competent for the complainant to controvert by a proper replication to the plea in bar, but which were admitted by the demurrer. Availing himself of the leave granted, the

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complainant withdrew the demurrer, and filed a replication to the plea in bar, controverting all of the matters of fact therein set forth. The respondents set down the replication for hearing under the before-mentioned rule, and the question in the case was whether the replication was a good answer to the plea.

According to the admissions of the replication, all of the matters of complaint set forth in the bill were substantially the same as those set forth in the former suit, and the replication also admitted that the suit was between the same parties, and that the respondents made answer thereto, and that testimony was taken, but denied that publication was ever made, or that the cause ever came on for hearing, or was ever heard by the court, and alleged that before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved for leave to dismiss his bill; and no objection being made thereto, the motion was granted by the court, and it was ordered that the bill of complaint should stand dismissed. The complainant also denied that the case was ever heard and considered by the court, or that the court ever pronounced any judgment or decree on the merits thereof, or that the court ever determined that the complainant had no right to the relief sought by his bill.

James B. Robb and *C. W. Huntington*, for complainant, cited *Carrington v. Holly*, 1 Dickens, 280; *Dixon v. Parks*, 1 Ves. Jr. 402; *Anonymous*, Id. 140; *Fidelle v. Evans*, 1 Brown, Ch. R. 267; *Knox v. Brown*, 2 Id. 186; *Curtis v. Lloyd*, 4 Myl. & Craig. 194; *Sea Ins. Co. v. Day*, 9 Paige, 247; *Neafie v. Neafie*, 7 Johns. Ch. 1; *Perine v. Dunn*, 4 Id. 140; *Cummins v. Bennett*, 8 Paige, 79; *Walden v. Bodley*, 14 Peters, 156, 160; *Aspden v. Nixon*, 4 How. 467, 497; *Conn. v. Penn.* 5 Whea. 424; *Bank of United States v. Beverly*, 1 How. 134; *Homer v. Brown*, 16 How. 354.

E. Merwin, for respondents.

1. The final decree in the former suit was an absolute, unqualified decree, dismissing complainant's bill.

It was made after the cause was at issue, and after the evidence had been taken, and order of publication passed.

It is therefore conclusively presumed to have been a decree on

the merits, or what is equivalent thereto, by consent or arrangement, as a settlement of the controversy.

Such a decree, unless qualified as "without prejudice," or "reserving right to bring another bill," or other equivalent qualification, is conclusive as to all matters involved in that suit. 2 Daniels, Ch. Pract. 1200; *Footte v. Gibbs*, 1 Gray, 413; *Bigelow v. Winsor*, 1 Gray, 301.

2. But this case does not depend upon the effect simply of an unqualified decree dismissing the complainant's bill; for this final decree was preceded by an order of the court disallowing the complainant to dismiss his bill without prejudice.

There was a specific and positive adjudication that the complainant should not be allowed to dispose of that suit so as to bring another for the same cause, and that the controversy ought to be, and must be, determined.

It is well settled that a suitor, after the testimony has been taken, and the cause is ready for a hearing, has no right as of course to have his bill dismissed, so that such dismissal shall operate only as a nonsuit at law.

Such leave will be granted only under proper circumstances. *Pickett v. Loggon*, 14 Ves. Jr. 232; *Bigelow v. Winsor*, 1 Gray, 299 – 301.

CLIFFORD, J. All of the matters of fact affirmatively set forth in the replication, which are well pleaded and material to the issue of law raised by the demurrer, must be considered as admitted.

Conceding that rule to be correct, it then appears that, before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and no objection being made thereto, the motion was granted, and the bill of complaint was accordingly dismissed without any hearing whatever upon the merits. On this state of the case I am of the opinion that the replication is a good answer to the plea, and that the record of the former suit and decree is no bar to the bill of complaint. At the argument the attention of the court was specially drawn to the docket entries in the former suit, and, to prevent any further controversy upon this prelimi-

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nary point, it may be well to refer to those entries. They are substantially as follows : On motion of the complainant, the time for taking testimony was extended to the 10th of May, 1858 ; and on the 3d of the same month the complainant moved the court further to enlarge the time for taking testimony, which motion was opposed by the respondents, and on the 10th of the same month the complainant renewed his motion, and the same was again objected to by the respondents, and thereupon it was ordered by the court, among other things, that leave be granted to the complainant to take a certain deposition ; interrogatories to be filed on or before the 17th of May, in behalf of the complainant, and the deposition to be taken and returned within eighteen days from the time when the cross-interrogatories of the respondents are filed, and that publication be deferred until that time. Afterwards, on the 6th of September following, no such interrogatories or cross-interrogatories having been filed, the complainant moved the court that his bill of complaint be dismissed without prejudice, and after hearing had thereon the complainant's motion was denied by the court, and the complainant then moved that his bill of complaint be dismissed, and the court, having considered the motion, ordered and decreed accordingly, " that the bill of complaint in this cause be, and the same is, hereby dismissed with costs for the respondents." From this statement it is quite evident that the allegations of the replication are correct. No order for publication was ever passed, and there was no hearing upon the merits of the controversy. Publication was expressly postponed, to give the complainant time to take a certain deposition ; and to prevent unnecessary delay in taking it, the order was made that he should file interrogatories within a given time, and that the deposition should be taken and returned within eighteen days from the time when the cross-interrogatories were filed by the respondents. Such interrogatories and cross-interrogatories were never filed, and in point of fact the deposition had not been taken at the time the complainant moved to dismiss his bill without prejudice. That motion was denied ; but the complainant subsequently moved to dismiss his bill, omitting from the

motion the words "without prejudice," and the order was accordingly made that the bill of complaint be dismissed with costs for the respondents. It is insisted by the respondents that the decree in the former suit dismissing the bill was final and conclusive between these parties in all matters at issue in that suit, and that the effect of the decree in that behalf is not varied or diminished by the fact that the motion to dismiss it emanated from the complainant. On the other hand, it is insisted by the respondents that a decree or order dismissing a former suit, even though it was between the same parties, can only be pleaded in bar to a new bill for the same subject-matter when it appears that the dismissal was decreed or ordered after a hearing on the merits. Elementary writers usually lay down the rule in the first instance in general terms, that a decree or order of the court by which the rights of the parties have been determined, or another bill for the same cause has been dismissed, may be pleaded in bar to a new bill for the same matter. Such writers, however, generally admit that the decree or order in such cases can only be pleaded in bar where the dismissal actually took place upon the hearing. 2 Dan. Ch. Plea. and Prac. 758; Cooper's Plea. 270; 2 Madd. Ch. 248; 1 Smith, Ch. 222; 1 Barb. Ch. 126. Judge Story says a decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon the hearing, and was not in terms directed to be without prejudice. But an order of dismissal is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another suit. Story Eq. Plea. (6th ed.) § 793, p. 700. Prior to the new orders in England, the better opinion is that the plaintiff could obtain the common order dismissing his bill with costs at any time before the cause was actually heard by the court. All the cases agree that he could do so before the cause was called on for final hearing, and in many cases it is held that he could do so afterwards, and that the decree or order of dismissal could not be pleaded in bar to a new bill, provided it appeared that it was made without any

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determination of the merits. Take, for example, the case of *Carrington v. Holly*, 1 Dick. Ch. R. 280, where it appears that, at the time when the cause was called on for hearing, an issue was directed by the court, but the complainant, being advised that the bill and the matter put in issue were insufficient to support his claim, applied by motion, and obtained the common order to dismiss his bill upon payment of costs. Afterwards the respondent applied to discharge the order for irregularity, upon the ground that the cause having been properly brought on to a hearing, the bill could not be dismissed except on a solemn judgment. Lord Hardwicke, however, held otherwise, and remarked in effect: "There has not been any determination, for the directing of an issue is merely to satisfy the conscience of the court prefatory to their giving judgment. The issue has not been tried, and until there has been a determination," I hold a plaintiff may, in any stage of the cause, apply to dismiss his bill upon payment of costs. It would have been otherwise, he said, had the issue been tried, and a verdict in favor of the defendant, because the defendant might then have set the cause down as in equity reserved, in order to have the bill dismissed upon the solemn judgment of the court, so as to make the order of dismissal pleadable. To the same effect also is the case of *Curtis v. Lloyd*, 4 Myl. & Cr. 194, which was decided by Lord Cottenham, in 1838, after it had been twice argued at the bar. When that cause was called on for hearing, the counsel for the complainant stated that it had come on unexpectedly, and at his request it was allowed to stand over until the next day. On the following morning the cause was again called on for hearing, when the same counsel informed the court that he had that morning obtained an order, as of course, dismissing the bill with costs, and that the suit was no longer pending. Objection to that course of proceeding was promptly made by the counsel of the respondent. They insisted that it was not competent for the complainant, after the cause was set down for hearing, and still less after it had been actually called on, and had only been allowed to stand over at his request and for the accommodation of his counsel, to obtain behind the back of his

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adversary a common order dismissing his bill. Such an order they insisted was irregular, and ought to be treated as a nullity. But the Chancellor said, after admitting that he was not before aware that the doctrine had been carried so far as it seemed to have been in the case of *Carrington v. Holly*, that he could not see why a complainant should be in a worse situation, because he informed the court that he did not intend to proceed with the hearing of his cause than if he made default, and emphatically added that in principle it was substantially the same thing. Several cases were cited at the argument to sustain the propriety of the proceeding, and many others might have been added of like import. *Lock v. Nash*, 2 Madd. Ch. 389; *White v. Westmeath*, 1 Beav. 174; *Anonymous*, 1 Ves. Jr. 140; *Dixon v. Parks*, 1 Ves. Jr. 402; *Fidelle v. Evans*, 1 Bro. C. C. 267; *Knox v. Brown*, 2 Bro. C. C. 185; *Gilbert v. Faules*, Freem. Ch. (ed. 1823), 158. From these authorities, it clearly appears that a complainant, prior to the adoption of the new orders by the English Chancery Court, might dismiss his bill at any time before a hearing upon the merits, upon payment of costs, unless perhaps there had been some order or proceeding in the cause conferring rights upon the respondent, which would be defeated or impaired by allowing that order. General authority is given to the Supreme Court, by the sixth section of the act of Congress of the 23d of August, 1842, to regulate the whole practice of the Circuit and District Courts of the United States, but no rule specifically applicable to the matter in question has ever been adopted. 5 Stat. at Large, 518. By the ninetieth rule regulating the practice in equity suits, it is provided, that in all cases where the rules prescribed do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, not as positive rules, but as furnishing just analogies to regulate the practice. That rule adopts the English practice, as it was known and understood in 1842, at the time this rule was ordained. Consequently the practice of this court remains unaffected by the new orders so called, which the courts of that country have since incorporated into their practice. What the practice was in the courts of that

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country prior to the adoption of the new orders has already appeared, and the authorities upon that subject need not be repeated. Several decisions of the Supreme Court may be adduced, which go very far to show that the practice here is substantially the same. Of these, the case of *Walden v. Bodley et al.*, 14 Pet. 160, is directly in point. Suits had been twice before instituted in that case, but it appeared that the first bill had been dismissed for the want of jurisdiction, and the second had also been dismissed on motion of the complainant at rules ; and the court held that neither was a bar to the new bill, because it appeared in both records that the cause had not been heard on the merits. Where a party asking the aid of a court of equity, says Marshall, C. J., in *Conn v. Penn*, 5 Wheat. 427, refuses to comply with the conditions on which the aid must depend, the court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case we think it would be harsh to make the decree of dismissal a bar to a future action. Some of the parties had been heard in that case, and a decree rendered which to a great extent decided the merits of the cause. Strong doubts, however, were expressed whether the decree was rendered on such a hearing as would make it a bar to a new bill ; but as it appeared that one of the respondents was not before the court, and that another person concerned in interest was not made a party, the point as to the sufficiency of the hearing was not decided. Whenever a suit in chancery is heard upon the merits, a decree of a court having jurisdiction of the parties and of the subject-matter is a final determination of the controversy, unless the court making the decree qualify it and expressly order that it be made without prejudice. Accordingly it was held by the Supreme Court, in the case of *The Bank of the United States v. Beverly et al.*, 1 How. 149, that a fact which has been • directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. Hence the judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this

there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing. *Hopkins v. Lea*, 6 Wheat. 109. Notwithstanding this rule, still it is well settled that a judgment of nonsuit at common law is no bar to a new suit, and cannot be pleaded in bar to a second action, although it is between the same parties, and for the same subject-matter, not even when the judgment of nonsuit was rendered upon an agreed statement of facts. It was so held by the Supreme Court in *Homer v. Brown*, 16 How. 354, and the same rule prevails in the State courts. *Bridge et al. v. Sumner*, 1 Pick. 371; *Morgan v. Bliss*, 2 Mass. 113; *Wade v. Howard*, 8 Pick. 353; *Knox v. Waldoborough*, 5 Me. 185. So it would seem, from analogy, that whenever a bill of complaint is dismissed without a hearing, and without any consideration of the merits, whether with or without the consent of the complainant, that the order of dismissal, being in the nature of a nonsuit at common law, ought not to be considered a bar to a new suit, because the matters in controversy are not thereby judicially determined. More direct authorities upon the subject, however, are to be found in the decisions of the State courts, where the question has often been presented. Where the respondent in a suit in equity pleaded a former suit, and a decree dismissing the bill in bar of a pending suit, Chancellor Kent held, that the decree was not a bar, because it appeared that no person was present on the part of the complainant when the decree was made. *Rosse v. Rust*, 4 Johns. Ch. 300. Some of the remarks of the Chancellor on that occasion are quite applicable to the present case. He said the merits of the former cause were never discussed, and no opinion of the court had ever been expressed upon them. It is, therefore, not a case within the rule rendering a decree a bar to a new suit. The ground of this defence by plea is that the matter has been already decided, and here has been no decision on the matter. And he also referred with approbation to the remarks of Lord Hardwicke in *Brandlyn v. Ord*, 1 Atk. 571, in which that learned judge said that, where the defendant pleads a former suit, he must show that it was *res judicata*, or an absolute

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determination of the court, that the plaintiff had no title. But the cases of *Perine v. Dunn*, 4 Johns. Ch. 140, and *Neafie v. Neafie*, 7 Johns. Ch. 1, are direct decisions of the questions here presented. In the former it was held that where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter, and in the latter it was held that a bill regularly dismissed on the merits may be pleaded in bar of a new bill for the same matter ; but to make a decree of a dismissal of a bill on the merits a bar, it must be an absolute decision on the same point or matter, and the new bill must be between the same parties. Numerous other decisions affirm the same principles, and indeed the decided cases are nearly unanimous upon the subject. *Cummins v. Bennett*, 8 Paige, Ch. 79 ; *Simpson v. Brewster*, 9 Paige, Ch. 245 ; *Smith v. Sherwood*, 4 Conn. 276 ; *Kennedy et al. v. Scovil et al.*, 14 Conn. 61 ; *Smith v. Smith et al.*, 2 Blackf. 232 ; *Seymour v. Gerome et al.*, Walk. Ch. 356. Reference is very properly made in the argument to the opinion given by this court on the demurrer to the plea. All of the facts stated in the plea were then admitted by the demurrer, and the docket minutes in the former suit were not before the court. That opinion, therefore, was necessarily based upon the legal construction of the plea under the admissions of the demurrer. But whether correct or not, it is better to be right at last than finally to adhere to an error. Replication adjudged sufficient.

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NEW HAMPSHIRE DISTRICT.

MAY TERM, 1859.

JOHN A. PARKER v. WINNIPISEOGEE LAKE COTTON AND WOOLLEN
MANUFACTURING COMPANY.

Equity jurisdiction will not be entertained in a case where the complainant alleges damages to his rights in consequence of the wrongful acts of the respondents, and where the whole case made in the bill is denied in the answer, unless the right of the complainant is clear and well defined, and there is danger of irreparable injury from the continuance of the nuisance, or unless where the right is clear and the injury certain, an injunction is necessary to prevent multiplicity of suits or suppress interminable or oppressive litigation.

THIS was a bill in equity praying for an injunction to restrain the corporation defendants from raising the surface of Lake Winnipiseogee, in the State of New Hampshire, or from retarding, obstructing, or holding back the natural flow of the water out of the lake and along the channel of the river constituting its outlet, to the premises of the complainant. The complainant alleged in effect as follows: that he was the owner of a certain parcel of land situated in Laconia, in this State, formerly owned by Daniel Tucker, together with the water privilege connected with the same, conferring the right to draw and use the one half of the water from the flume connected with the premises, together with a certain described portion of the second story of the building erected on the walls of the trip-hammer shop, with the water right and mill privilege of one twelfth part of the whole water power of the outlet or river on the Laconia side, at the dam there erected, in the village of Meredith Bridge. He further alleged that the outlet of the lake is called Winnipiseogee River, and has its source in the lake at a place called the "Weirs," six miles above the village of Meredith Bridge, where the complainant's premises are situated. The outlet was formerly by a natural channel, about fifty yards wide, and from five to seven

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hundred feet in length, when the water passed into Long Bay, and at the foot of the channel there was a natural fall of about three feet. Long Bay is a sheet of water about four and a half miles in length, and from a half-mile to a mile in width. At its foot the water is discharged into what is called Little Bay, through a channel about one thousand feet in length. Lake Village is situated on this channel. Here, before the dam was built, there was a natural fall of several feet. From that point the channel of the river passes across the southerly end of Little Bay, a distance of about a mile and a half, and then the stream empties into Sanbornton Bay, through a channel from fifteen hundred to two thousand feet in length. Little Bay forms the head-waters of the dam, connected with the premises of the complainant, which were situated in the village of Meredith Bridge, on the margin of the channel between the two last-mentioned bays. For the distance of about five miles, the current of the river then passes through Sanbornton Bay, and is then discharged out of it at a place called Union Bridge, and from Union Bridge the river pursues its course in nearly a right line to the Merrimac.

In the year 1831, as the complainant alleged, the respondents became possessed of a certain water right and mill privilege situated on that river, above his premises, at the place now called Lake Village, where, in the year 1835, they constructed a dam across the river, or became the proprietors of it after it was constructed ; this dam being higher than any former one.

Moreover, that the dam was so constructed, that it enabled them to raise the water in Long Bay several feet, and draw it down again to its natural level, but as it did not disturb the level of the water in the lake, he did not complain.

Subsequent to the year 1846, as the bill alleged, the respondents, claiming to hold possession of the land commanding the outlet of the lake, at the weirs, above the complainant's premises, made excavations through the fall in the river, by which the river bed was deepened six or seven feet, the fall mostly removed, and the water from the lake brought into the bay in larger quantities than it naturally flowed, by which the natural level of

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the lake might be lowered four or five feet. In 1851 or 1852 the respondents erected another dam at Lake Village, below the one previously existing, and of equal or greater height, whereby they could raise the water in the bay to the level of the lake, could discharge a much greater quantity of water than formerly and naturally flowed in the river channel, and could control the amount of water both in the lake and in the river. By this, the complainant alleged, that his water power was damaged, by the unequal supply of water produced in consequence of the respondents' dams and excavations. Another ground of complaint was, that one Stephen Perley wrongfully cut a canal through his own land, tapping the bay above complainant's dam, by which water was drawn out of the bay above complainant's dam, and returned into it below the same; that respondents had bought the canal, deepened it, and removed a dam at its mouth, which dam was erected to prevent the water passing into the canal until at a certain height at his dam. The bill prayed that respondents might be restrained from raising the surface of the lake, from holding back the natural flow of the water out of the lake, or along the river to complainant's premises; and therefore prayed that they might be compelled to reduce the size of their gates, prohibited from adding to the height of their dam, and be compelled to make a solid stone dam across their excavations at the outlet to the height of the bed of the channel, so as to render it impossible to draw off the water of the lake below its former natural level; that they may be restrained from the use of the canal, or, if permitted to use it, they shall raise the channel of the inlet to the height it was at the time of their purchase.

Such were the material allegations of the bill, which were, for the most part, denied in the answer, except the building of the dams, and making the excavations through the fall of the river. Possession by complainant of a twelfth part of the water power of the river, on the Laconia side, at the dam there erected in the village of Meredith Bridge, or that he owned any water right or mill privilege whatever in the premises, except the one half of a certain fixed and limited water power, were denied in the answer. It was alleged that complainant owned no part of the land where

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the dam stood, but it was admitted that he owned a right to draw water to carry wheels for operating a trip-hammer, grindstone, and bellows, and that it was to be drawn through a long open flume of a certain height and dimensions.

It was further set up in the answer, that the quantity of water which the complainant was entitled to draw did not vary with the height of the water in the dam, unless the water fell to a level lower than the top of the flume, and the respondents alleged that it never had so fallen through their act or agency. The respondents also alleged that one Francis Boynton owned the right to draw water from the flume connected with the premises, sufficient to carry wheels to operate a trip-hammer, grindstone, and bellows, and that he sold one half that right to the complainant.

John A. Parker, pro se.

William H. Y. Hackett, for respondents.

CLIFFORD, J. Inequality in the quantity of water flowing in the river by the premises of the complainant greater than what naturally arose from the ordinary changes of the season, or from the ordinary fluctuations in the head of water in the lake before the attempted regulation of the same by the respondents, constitutes the *gravamen* of the injury alleged to have been sustained by the complainant. His representation is that the water power of his privilege is damaged to the same extent as the equality of the supply of water at all seasons is disturbed for the use and improvement of his water power. He does not allege that the quantity of water is too small or too great in his flume, nor does he pray for an increased or diminished quantity to flow into the same, or to be protected against back water, but prays that the respondents may be restrained from using and perfecting their improvements for regulating the flow and supply of water in the dam, solely upon the ground that his rights are damaged by such regulation. Accordingly he alleges that the respondents have seized upon and taken possession of the waters of the lake, and used the same as a reservoir to his hurt and damage, in the use, value, and capacity for improvement of the water power at Meredith Bridge, and have extended and intend to extend their excavations so as to enable them to draw off the water from the

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lake six feet below its former low-water level. What he seeks to accomplish is, to restore the flow of water from the lake and in the river to its former state, and to preserve it in that condition. Looking at the answer of the respondents, it is obvious that they deny the whole case made in the bill of complaint. They deny that the complainant is seized and possessed of one twelfth part of the water power of the river on the Laconia side, and in fact deny that he owns any part of the dam, or any right in the water power, except a restricted easement authorizing him to draw and use a certain limited quantity of water equal to one half of the quantity sufficient to carry the wheels to operate a trip-hammer, grindstone, and bellows, or equal to one half the water in the flume described in the answer, and in respect to that easement they expressly deny that they have ever interfered with the same, or in any manner injured his mill privilege or water power. Beyond question, therefore, the case is one where the whole ground of relief set up in the bill of complaint is expressly controverted and denied by the answer. Under these circumstances, it is insisted by the counsel for the respondents that the case is not one where this court sitting as a court of equity can properly take jurisdiction, but that the jurisdiction must be declined for the want of equity in the bill. In regard to private nuisances, Judge Story says: "The interference of courts of equity is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits, and he well remarks that it is not every case that will furnish a right of action against a party for a nuisance which will justify the interposition of courts of equity to redress the injury or remove the annoyance. But there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly occurring grievance which cannot be otherwise prevented but by an injunction." 2 Story Eq. (7th ed.) § 925, p. 230; *City of Georgetown v. The Alex. Canal Co.*, 12 Pet. 98.

Irreparable injury, actual or threatened, is not alleged in this case, and there is nothing in the nature of the grievance or the

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proofs exhibited to warrant the conclusion that any such consequences are likely to flow from its continuance. Courts of equity will interfere by injunction, says Shepley, J., in *Porter v. Witham*, 17 Me. 294, where the party has long, and without interruption, enjoyed a right which has been recently injured, or which is in danger of being injured or destroyed"; and when, if it has not been established by long usage, it has been by a judicial decision, but it is not ordinarily to determine the right in the first instance that chancery hears the case, and then, if found to be established, exercises its extraordinary power to protect it. Chancery interference, in the first instance, rests on the principle of a clear and certain right to the enjoyment of the matter or thing in question, and an injurious interruption of that right, which on just and equitable grounds ought to be prevented. *Morse v. Machias Water-Power Co.*, 42 Me. 119. Accordingly it has been well held that it must be "a strong and mischievous case of pressing necessity," or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of a court of equity. *Van Burgen v. Van Burgen*, 3 Johns. Ch. 282; 2 Eden on Injunc. per Waterman, 269; *Gardner v. Village of Newburg*, 2 Johns. Ch. 165; *Reid v. Gifford*, 6 Johns. Ch. 19; 2 Story, Eq. (7 ed.) § 924 a. If the thing sought to be prohibited, said Lord Brougham in *Earl of Ripon v. Hobart*, 3 My. & K. 169, is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial at law; but where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere until the matter has been settled at law. Where the title or injury is doubtful or disputed, or where the injury is slight and inconsiderable, courts of equity are disinclined to interfere. *Whittlesey v. H., P., & F. Railroad Co.*, 23 Conn. 421; Adams, Eq. 487, note. Mr. Angel concurs with Judge Story, that the interference of courts of equity by injunction in matters of private nuisance is founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of

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preventing a multiplicity of suits; and he affirms that they will interfere in those cases only, as a general rule, where the right of the party complaining is clearly established, and the injury which he *must* necessarily sustain is of such a nature that no adequate compensation can be afforded by damages, unless when delay itself would be wrong. Ang. on Wat. § 444; 3 Daniel, Ch. Plea. and Prac. 1858; *Wystanley v. Lee*, 2 Swanst. 334; *Whitechurch v. Hide*, 2 Atk. 391; *Coalter v. Hunter*, 4 Rand, 58; *Gates v. Blentot*, 1 Dana, 15. No remedy whatever exists in equity for a public nuisance, says Mr. J. Woodbury, in *Irwin v. Dixon et al.*, 9 How. 27, unless the individual has suffered some private, direct, and material injury beyond the public at large, as well as damages otherwise irreparable. In cases of injury to individual rights by obstructions or supposed nuisances, the same learned judge says that an injunction is still less favored, and finally adds that when the right or title to the place in controversy, or to do the act complained of, is doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till a trial at law is had, settling the contesting rights and interests of the parties. Where the thing sought to be prohibited is in itself a nuisance, or where from its position as exhibited in the proofs it is necessarily such, and there is no doubt or controversy about the right of the complaining party, or the nature and extent of the injury, a different rule prevails. *State of Pennsylvania v. The Wheeling Bridge Co.*, 13 How. 567. But where the evidence to establish the right is conflicting, and it is doubtful whether any appreciable injury has been suffered, chancery will not interfere until the rights of the parties are settled at law. *Brown's case*, 2 Ves. 415; *Weller v. Smeaton*, 1 Cox Ch. 102; *Attorney-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Dana et al. v. Valentine*, 5 Met. 14; *Ingraham v. Dunnell et al.*, 5 Met. 126. To authorize an injunction there should be not only a clear and palpable violation of the rights of the complainant, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured. *Olmsted v. Loomis*, 6

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Barb. S. C. 160. All of these cases, or nearly all of them, proceed upon the ground that equity jurisdiction is not to be entertained in cases like the present, unless the right of the complainant is clear and well defined, nor unless there is danger of irreparable injury from the continuance of the nuisance, or unless where the right is clear, and the injury certain, an injunction is necessary to prevent a multiplicity of suits, or to suppress oppressive or interminable litigation. One suit at law will probably determine the nature of the complainant's rights and the extent of his injuries, and if, when that determination is made, the respondents fail to respect those rights, it will then be competent for the complainant to seek the interposition of a court of equity. Having come to this conclusion, no opinion will be expressed upon the merits of the controversy, except to say that the facts of the case as well as the pleadings clearly bring it within the rule requiring the court to decline jurisdiction until the rights of the parties are settled at law. Bill dismissed.

MASSACHUSETTS DISTRICT.

MAY TERM, 1859.

GEORGE F. PATTEN *et als.* v. FRANCIS DARLING *et als.*

In a suit by the owners of a ship against the owners of the cargo, for contribution for the loss of masts sacrificed for the common benefit of ship, cargo, and freight, the master, except in cases where he would be exonerated from some certain liability, if the owners should prevail, is a competent witness for the owners.

A deposition was taken after publication had passed, and upon interrogatories filed by leave of court, and application was made to the court to suspend the commission, but counsel consenting to strike out certain interrogatories, the motion was not pressed, and this motion to suppress was made at the final hearing. *Held*, under the circumstances of the case, and inasmuch as the commission issued by special leave of court after due notice, that the deposition ought not to be suppressed.

Where masts and spars are cut away in a storm, and, in falling, injure the deck of a vessel,

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or destroy rails and bulwarks, the repairs of such damage belong to general average; and it is well settled by the Supreme Court, that the voluntary stranding of a vessel, when required and designed for the common safety of the associated interests, constitutes a case for general contribution, even though it be followed by her total loss, provided the cargo is thereby saved.

THIS was a bill in equity brought by the complainants, owners of the ship *Delaware*, wherein they claimed from the owners of the cargo a contribution by way of general average, for the loss of the masts, sails, spars, and rigging of the ship, which it was alleged were sacrificed for the common benefit of the ship, cargo, and freight. On the 17th of February, 1857, the ship, then lying in the port of Savannah, took on board to be transported to Boston certain goods and merchandise consigned to the respondents. On the 2d of March following, while the ship was in Massachusetts Bay, she encountered a severe gale and snow-storm from the northward, and at half past three on the following morning it was deemed expedient to attempt to run into Nantasket Roads, for the safety of the vessel, as she was drifting westward, and at four and a half o'clock she came to anchor in nine fathoms of water, Boston Light bearing northeast. The reason for anchoring was that a strong ebb tide set the ship to leeward, insomuch that it was impossible to get up farther. While thus anchored, and at about half past nine in the morning, the tide being at about flood, the wind blowing very heavily and the sea running high, the ship swung with the tide and began to strike on the bottom. When this occurred the wind was blowing toward the shore, and it was deemed expedient by the master to cut away the masts in the hope that the ship might be prevented from drifting on shore, or if she did, she might be saved from going to pieces and being totally lost. Accordingly the master ordered the lanyards cut away, leaving the masts without any support; one of the masts then went overboard, and soon after, the wind increasing, the ship dragged her anchors and went on shore on a stony beach in Hull, near the Toddy Rocks, where the other masts also fell. By this sacrifice, alleged the complainants, the ship, cargo, and lives of the crew were saved from impending destruction, and that the ship, after the storm

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subsided, laid in safety on the beach, with her cargo on board, and this was afterwards taken out and delivered to the owners, who received it. Such were the substantial allegations of the bill, which also set up an agreement by the respondents to pay to complainants such sums of money as might be due as their share of any contribution which might be found due for sacrifices made and losses sustained for the benefit of all concerned.

None of the acts of the master after the storm commenced were admitted in the answer to be as alleged in the bill. That there was necessity for cutting away the masts; that the same conduced to the safety of the ship or cargo; that the wind was heavy; that she was expected to go to pieces if not relieved of her masts, and that she laid more easily when thus relieved, were denied. The respondents averred that the vessel lay on the beach, with her cargo after the storm, but that she was a wreck, and that the cargo was taken out in a damaged condition; that they paid all expenses in discharging the cargo, which was left in the ship at a distance from her port of destination. The cargo was received by them, as they said, with the agreement that such sums of money should be paid by them to complainants as should be fairly due for losses and expenses properly incurred, for the benefit of all interested, but they alleged those on board the ship were guilty of neglect and carelessness; that the cutting away the masts was not instrumental in saving the vessel or cargo, and that she could not have been got off from the beach and repaired; that the hull was sold for four thousand dollars, which was all it was worth.

F. C. Loring, for complainants.

The only question is, whether the value of the masts, &c., should be included in the adjustment of the general average. With reference to this there are three issues. 1. The intention with which the masts were cut away. 2. Whether it tended to preserve the vessel, cargo, and freight. 3. Whether they *were* saved thereby. In the United States courts it is held, if a ship is voluntarily stranded for the common benefit, and is thereby wrecked, the cargo is to contribute to indemnify the owners. *Col. Ins. Co. v. Ashby*, 13 Pet. 331; *Barnard v. Adams*,

10 How. 270; *Sturgess v. Cary*, 2 Cur. 59. As to who is to decide when there is a peril, in order to constitute a case of general average. *Lawrence v. Minturn*, 17 How. 109–111. The greater and more imminent the peril, the more merit to be attributed to the sacrifice.

In this case there were the three requisites to a general average, — a peril, a sacrifice, success.

B. R. Curtis and *H. Durant*, for respondents.

It is incumbent on the ship-owner to allege and prove : —

1. That the vessel, cargo, and freight were subject to a common peril.

2. That the peril was not occasioned by want of due skill on the part of master and officers. *Ins. Co. v. Sherwood*, 14 How. 365; *Lawrence v. Minturn*, 17 How. 110.

3. That the sacrifice was voluntary, and actually and intentionally made.

4. That the sacrifice was a reasonable and skilful act.

5. That the sacrifice was the means of relieving the interests not sacrificed from the particular peril it was designed to avert. *Col. Ins. Co. v. Ashby et als.*, 13 Pet. 338, 339; *Williams et als. v. Suffolk Ins. Co.*, 3 Sumn. 510; *Caze et al. v. Reilly*, 3 Wash. 298; *Scudder v. Bradford*, 14 Pick. 13; *Nickerson et al. v. Tyson*, 8 Mass. 467; Marsh. In. 462, 463; Stevens on Av. 8; 3 Kent's Com. 234, 235.

The particular peril was the danger of dragging the anchors and going ashore. Complainants have not shown that the peril was not occasioned by the want of skill of their servants.

The sacrifice of the masts was not voluntary. If a jettison of masts be made to avoid stranding, and stranding is not thereby avoided, no contribution follows. Cases above. The stranding in the case was not voluntary. Those on board no more elected any of the incidents of the stranding than the stranding itself.

CLIFFORD, J. Most of the circumstances attending the disaster are satisfactorily proved, and there is much less conflict in the testimony than is usual in cases of this description. As alleged in the bill of complaint, and admitted in the answer, the ship sailed from Savannah on the 17th of February, 1857, bound

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on a voyage to Boston. At the time of her departure she was a sea-worthy vessel, properly laden with cotton and hides, and was in every respect fit for her intended voyage. All of the sails except two were made of hemp, and they were all nearly new, and she was copper fastened. She was well manned and equipped, her whole company consisting of nineteen men, including the master, two mates, the cook, and steward. According to the testimony of the master, she was in every way in good condition when she sailed, and there is no sufficient reason from the testimony to call in question the truth of his statement. Her hull, planking-timbers, and fastenings were in good order, exhibiting no appearance of weakness or decay, and she did not leak throughout the voyage. Prior to her arrival in Massachusetts Bay she had met with no difficulty, and, for aught that appears to the contrary, was in the same condition as when she sailed from the port of departure. At six o'clock in the afternoon of the 2d of March, 1857, she was about twenty miles east of Boston Light, as estimated by the master. That evening the weather became thick and stormy, the wind varying from east to northeast, and there was a heavy sea, and during the night it snowed and the gale increased. About midnight they made Boston Light bearing west-southwest, and soon after found that the ship would go ashore unless they ran into the harbor. At that time, the master says, the ship was on a lee shore, and as he could not get a pilot he concluded to run her in without one, finding that it was impossible to work her off against the wind and storm. Accordingly he sailed for Boston Light, which he passed in safety, and came to anchor in nine fathoms of water, that light bearing northeast. During the ebb-tide the ship rode well and safely, but when the tide turned, the gale increased, and, the wind shifting more northerly, the ship, in swinging with the tide, commenced thumping on the bottom. In this emergency the master ordered the lanyards to be cut, in order, as he says in his first deposition, to prevent the ship from starting her anchors and going on shore. That order was nearly executed when the vessel started adrift, and the masts went over the side of the vessel soon after she struck on the beach. Considerable damage was done to the vessel by the falling of the

masts. On the starboard side the mainmast, in going over, broke the rail, bulwarks, and three stanchions, and chafed and split the planksheer. Some damage was also done by the falling of the mizzen-mast. In going overboard it broke a hole through the top of the house, injuring the chains, channels, and guards, and the foremast in falling broke the rails, bulwarks, and two stanchions on the same side of the vessel. It was after the tide turned that the ship went ashore ; and as the tide rose the hull was driven by the gale and the force of the sea farther up on to the beach. When the vessel struck, the wind was blowing a hurricane from the north-northeast, pressing the vessel directly on to the shore, and the sea continued to make breach over her till the tide ebbed. She went on shore between nine and ten o'clock in the morning of the 3d of March, 1857, and all the crew remained on board till ten o'clock in the evening of that day, when they were taken off in a life-boat. At that time the tide had ebbed, and there was less sea, and on the following day the storm so far moderated, that they commenced to discharge the cargo from the ship. After the discharge it appeared that she had two holes in her bottom, caused by striking against the rocks, one under her fore-chains and one under her mizzen, and several of the knees were started, and some of her beams were broken. In his second deposition, the master testifies that he consulted with his officers before cutting away the masts, and that they came to the conclusion that the vessel, in the situation in which she then was, must soon start her anchors and go ashore, in which event they expected she would go to pieces, especially if the masts were left standing. He also says, that the masts were cut away for the reason mentioned in his first deposition, but more particularly to prevent the vessel from going to pieces, in case the anchors did not hold, and she went ashore. Just as they had concluded to cut away the masts, he says all the crew came aft and wanted to get out the boats and leave the ship ; but he told them he would first cut away the masts, which might possibly keep the vessel from going ashore, and if not, would no doubt prevent her from going to pieces, and that the work of cutting the masts away was then immediately commenced.

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Certain preliminary objections are taken to the testimony of the master in this case, which will now be briefly considered. In the first place, it is insisted that he is not a competent witness, and several decided cases are referred to in support of the proposition. Masters of vessels are generally competent witnesses in suits brought by the owner, except in cases where they would be exonerated from some certain liability, provided the owner should prevail. Mere bias arising from the motive to vindicate their own conduct, unaccompanied by any interest in the event of the suit, only affects their credit as witnesses, and is not in general sufficient to exclude their testimony. Where the suit is against the owner, and the master is liable to indemnify him in case the suit is maintained, or where he would be exonerated from a certain and determinate liability in case the owner prevails, in general he is not a competent witness. All of the cases referred to by the counsel for the respondent are of this latter class. One is the case of *The Hope*, 2 Gall. 48, and another is that of *The Nymph*, Ware, 259. Those cases affirm the rule, that in a libel against a vessel for a forfeiture occasioned by the alleged misconduct of the master, he is not a competent witness, for the reason that if his acts should be adjudged illegal, and draw after them the condemnation of the vessel, he would be responsible to the owners for the consequences. They also affirm the doctrine, that the decree in the admiralty would be evidence against him in a suit by the owners for the damages. Some doubt is entertained on this last point, but it is unnecessary to determine the question at the present time. *Johnson v. Huckins*, 6 Law Rep. 311; *Flan. on Ship.*, 153. Reference is also made to the case of *The William Harris*, Ware, 373. That was a libel against the vessel for seamen's wages, in which the owners claimed that certain deductions ought to be made in the nature of set-off, on account of certain expenses incurred abroad, in the imprisonment of the libellant by the procurement of the master. Such expenses it seems in certain cases are paid by the master, and charged to the owners, and if the imprisonment was unnecessary, and his own conduct unjustifiable, then the charge was an improper one, and he would be liable to refund the

amount so charged. He was offered as a witness in that case to justify his own conduct, and throw the expenses of the imprisonment upon the seamen, but was excluded by the court on the ground that he was interested in the event of the suit. Considerable conflict exists in the decided cases on the question, whether the master is a competent witness in a suit against the vessel or owners for seamen's wages ; and authorities may be found on both sides. Unless he is called to justify an act for which, if not justified, he would himself be liable, it is generally held in England that he is a competent witness, and such appears to be the tendency of the modern authorities upon the subject. *The Lady Ann*, 1 Edw. A. R. 235 ; *The Mid Lothian*, 5 Eng. L. & Eq. 556 ; *The Trial*, Bl. & How. 94 ; *The Steamboat Hudson*, Olcott, 396 ; *The Exeter*, 2 C. Rob. 261. When not interested as part owners, masters are constantly admitted as witnesses in cases of collision, and no reason is perceived why they are not equally competent in suits for contribution. They have no immediate interest in the event of the suit, and it is certain that the decree in a case like the present would not be admissible to affect the interests of the master, in any subsequent suit which might be brought against him by the owners of the vessel. In such cases the acts of the master are only collaterally drawn in question, and, in contemplation of law, his liability for negligence at the suit of the owner is too remote and contingent to exclude him as a witness. Whatever effect it may be supposed to have upon the truth of his statements goes to his credit, and not to his competency. For these reasons I am of the opinion that the master is a competent witness. *Barnard et al. v. Adams et al.*, 10 How. 301.

Objection is made, in the next place, that the second deposition of the master was irregularly taken, and it is insisted that it ought to be suppressed. It was taken after publication had passed, but the motion to suppress was not made until the cause came on for final hearing. As stated at the argument, and not denied, it was taken on written interrogatories filed by leave of court. After leave was granted, application was made to the court to suspend the commission. On this last occasion the

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counsel on both sides were present, and the counsel for the complainants consenting to strike out certain interrogatories, the motion to suspend the commission was not pressed to a decision. Under these circumstances, I am of opinion that the objection was waived, and, inasmuch as the commission issued by the special leave of the court after due notice, I think the deposition ought not to be suppressed.

Twelve other witnesses were examined by the complainants, five of whom saw the ship on the morning of the disaster. None of them, however, were on board the vessel before she went ashore, and as their statements respecting the circumstances of the disaster, so far as they are within their knowledge, substantially confirm the statement of the master, it would be useless to repeat them. Some twenty witnesses were also examined by the respondents, and eleven or more of that number also saw the vessel, but were not on board before the ship was stranded on the beach. Five of them were in a pilot-boat, and at one time approached very near the vessel while she lay at anchor, but as their testimony has respect chiefly to the questions whether the master exercised proper skill and diligence to prevent or avert the disaster, or whether the sacrifice made was necessary to avoid the peril, or was attended with success, it will be considered in connection with the several propositions assumed by the counsel for the respondents. In respect to the immediate circumstances of the disaster, the witnesses of the respondents do not differ materially from the statements made by the master. A claim for contribution by way of general average rests upon certain elementary principles of law which have long since been well settled. Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit and safety of the associated interests shall be made good by all. That principle, says Mr. J. Grier in *Barnard et al. v. Adams et al.*, 10 How. 303, is recommended not only by its equity but by its policy, because it encourages the owner to throw away his property without hesitation in time of need. In order to constitute a case for general average, the same learned judge remarks that three things must concur, — first, there must

be a common danger in which the ship, cargo, and crew all participate, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder; in the second place, there must be a voluntary jettison, or casting away of some portion of the associated interests, for the purpose of avoiding the common peril, or, in other words, a voluntary transfer of the peril from the whole to a particular portion of those interests; thirdly, the attempt so made to avoid the common peril must be successful. Every such sacrifice must be made deliberately and with the object of saving or protecting the remainder of the property at stake. Whenever the peril of a common destruction is apparently so great as to compel the master, in the exercise of proper skill and judgment, to choose between the loss of the ship, cargo, and the lives of those on board, and the jettison or casting away of a part of the associated interests, the master is justified, and indeed it is his duty, to make the sacrifice for the benefit of all concerned. But the right to contribution is not made to depend on any presumed or real intention to destroy the thing cast away, but on the fact that it was selected, under the circumstances before mentioned, to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved. Much is deferred in such an emergency to the judgment and decision of the master, in whose custody, and under whose control, all those interests are necessarily placed. Owners of vessels are under the obligation to employ masters who are competent, and who have reasonable skill, judgment, and courage in the performance of their duties, and they are liable if, through their failure to possess or exert these qualities in the control and management of the vessels under their command, the goods or merchandise of the shipper are damaged or destroyed. They do not, however, contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency precisely what, after the event, others may think would have been best. It was so held in *Lawrence et al. v. Minturn*, 17 How. 110, and the conclusion of the court in that case appears to be just and reasonable. From the necessity of the

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case, the law imposes upon the master the duty and clothes him with the power to judge and determine whether the circumstances of danger which surround the vessel, cargo, and crew are or are not so great and pressing as to render a jettison of a portion of the associated interests expedient and necessary for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction in judgment of law, he can best decide, in the emergency, what the necessities of the moment require to save the property intrusted to his care, and the lives of those on board. In contemplation of law he derives this authority from the implied consent of all concerned, and, in the absence of any proof to the contrary, it must be presumed that his decision was wisely and properly made.

Accordingly, it was held in *Lawrence et al. v. Minturn et al.*, and the principle was subsequently affirmed in *Dupont v. Vance et al.*, 19 How. 166, that, if he was a competent master, if an emergency actually existed, calling for a decision whether or not to make a jettison of a part of the cargo, if he appears to have arrived at his decision with due deliberation by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. In all such cases the sacrifice made will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted the power to decide upon and make it has duly exercised that authority. It is not denied by the counsel of the respondents, that the ship, cargo, and crew in this case were subject to a common danger, but it is contended that the particular peril impending at the time the masts were cut away was the danger that the ship would drag her anchors and go ashore, and it is insisted that she was not saved from that particular peril. Notwithstanding the masts were cut away, the vessel went ashore, but the goods and crew were saved. Some stress is laid upon the fact, that the master, in his first deposition, stated that his intent in cutting away the masts was to prevent the ship from starting her anchors and going ashore, but it should

not be overlooked that he also stated, in the same deposition, that they were afraid the vessel would go to pieces from the effect of the sea or by striking against the rocks to which she was driving. His second deposition explains more fully his precise intent, or rather the hopes and fears he entertained at the time the masts and spars were cut away, and every one of those explanations are perfectly consistent with his statements in the first deposition. By cutting away the masts and spars, he hoped that the anchors would hold, and that the ship might ride out the storm. But if not, and she should go ashore, that she would thereby be prevented from going to pieces upon the rocks, and that the crew and cargo might be saved. That twofold purpose is so obvious from all the attending circumstances, that one would scarcely fail to see and understand it, even if it were less clearly indicated than it is in his first deposition. Common experience teaches that a vessel, in going ashore in a storm on a rocky beach, is less likely to go to pieces with her masts down than while they are standing, and testimony to the contrary is entitled to very little weight. After a careful comparison of the two depositions given by the master, I am of the opinion that they do not conflict in any material respect, and that there is nothing in either to impair the credit of the deponent. All the associated interests were in peril, not only from the liability of the vessel's going ashore, but of a total destruction from the elements, and from this latter peril they were all saved. Common prudence required that the master should look beyond the mere hazard that the anchors were liable to drag, to the danger that the vessel might be dashed against the contiguous rocks ; and if he had been less candid in his statements, and had denied that his intent in cutting away the masts and spars was to avoid the peril of a common destruction in case the vessel went ashore, he would not, under the circumstances proved, have been entitled to credit. When masts and spars which have been cut away injure the deck of the vessel in falling, or destroy rails and bulwarks, or do other damage, the repairs of such damage belong to general average ; and it is well settled by the Supreme Court that the voluntary stranding of a vessel, when required and designed

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for the common safety of the associated interests, constitutes a case for general contribution, even though it be followed by her total loss, provided the cargo is thereby saved. *Columbian Ins. Co. v. Ashley et al.*, 13 Pet. 343; *Barnard et al. v. Adams et al.*, 10 How. 302. That doctrine is denied in some jurisdictions, but it is settled law in this court, and it is believed to rest upon the solid foundations of reason and justice. *Caze v. Reiley*, 3 Wash. 298; *Sims v. Gurney et al.*, 4 Bin. 513; *Gray et als. v. Waln*, 2 S. & R. 229.

In the next place it is insisted by the counsel for the respondents that the complainants have not shown that the peril in question was not occasioned by want of due skill, exertions, and vigilance on the part of the master, officers, and crew of the ship. To support this proposition, they assume, in the outset, that whatever dangers the ship encountered arose from her being at anchor in the place where she lay at the time the order to cut away the masts and spars was given, and they insist that the causes which rendered it necessary to anchor there at four o'clock in the morning of the 2d of March, 1857, did not continue to operate at the time the order was executed, and that it was not necessary to remain there after daylight on the day of the disaster. Impliedly, the proposition admits that it was necessary to anchor there on the morning before the disaster, and the bill alleges in effect that the storm continued, and the wind increased till after the vessel went ashore. In his second deposition, the master says, that he was not at all acquainted with the anchorage where the ship lay, and judged that there was no chance of removing the vessel to a place of greater safety. He consulted with his subordinate officers before he decided to cut away the masts, and there is much reason to conclude that, if he had not so decided, the crew would have left the ship in the boats. On the point whether the master ought not to have made an effort to remove the vessel to some other place, a great number of witnesses were examined by the respondents. Many express the opinion that he ought to have done so, while others speak with less confidence or with some hesitation; and another class say, with more reason, that, if he had been acquainted with the

anchorage, he ought not to have remained where he was, but admit that it would be different with a stranger, or one not acquainted with his situation, and some of them say that if he did not know the ground, it was not imprudent to remain where he was. He was wholly unacquainted with his situation; and, in the midst of the difficulties and uncertainties which surrounded him, I am of the opinion that he was not wanting in the exercise of reasonable skill and diligence. Those who encounter danger cannot always suit mere lookers-on in the choice of the means they employ to avert it, for the reason that it is easier to find fault than to do in any such emergency. In this case the master had every motive to employ the best means in his power to save the vessel, cargo, and crew, and there is no sufficient evidence in the case to show that he did not perform his duty with coolness, and with the best lights of his judgment. All on board were participants in a common danger, and there is no proof in the case that they did not all concur in the propriety of the master's acts. When the crew came aft with the view to take the boats and abandon the ship, they did not complain that anything had been omitted which ought to have been done, nor did they suggest any other means of avoiding the peril than that proposed by the master.

It is also insisted by the respondents that the master was guilty of negligence, in not adopting reasonable and proper means to secure the assistance of a pilot on the morning of the disaster. On this branch of the case there is some conflict in the testimony. Four or five pilots belonging to the pilot-boat Phantom were examined by the respondents. One of them testifies that the pilot-boat was lying in the sand-cove, near the narrows, and that, seeing a light about five o'clock that morning, they slipped their chain and ran down in that direction. Others testify to the effect that they saw the light of the vessel before daylight, between five and six o'clock in the morning. She was then lying at anchor, and, according to their testimony, they sailed within three or four hundred feet of her, but admit that they were afraid to round her stern, because she was so near the beach they thought their boat might hit the

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bottom, and, seeing no one on the deck of the vessel, they immediately withdrew, but shortly afterwards repeated the experiment with a like result. Subsequently they were about to approach her for a third time, but seeing a British steamer coming in, they stood away to put a pilot on board the steamer. After having boarded the steamer, and while they were running up the channel, they, for the first time, saw a signal for a pilot in the fore rigging of the ship, but they admit it was of no use at that time to try to get her away, as the wind had shifted more to the northward. Every one of these witnesses saw the vessel before daylight, and in effect admit that they knew she was in need of a pilot. Their excuse for not going on board is, that there was no signal set, or hail made from the vessel. On the other hand, the master testifies that some one was on deck all the time, and that he himself was not below after anchoring, for more than ten minutes at any one time until the vessel went ashore. He saw the pilot-boat get under way and work out to the windward of the ship, but says she did not come within hailing distance; and he further says, that when she proceeded to the steamer he set the signal for a pilot in the fore rigging of the ship, lest the pilot should think he was supplied. At that time all the sails of the ship were furled, and the master says that the signal could be seen from the fore rigging as easily as from the foremast-head. All the circumstances tend to show that the signal was set as soon as the master considered that the vessel was in danger. Unacquainted as he was with the anchorage, it would be unreasonable to suppose that he could have anticipated, in the midst of a northeast storm, at that hour of the morning, that the wind would change with the tide at half past nine. As soon as he saw the pilot-boat, and found that she was standing away from his vessel, he set the signal. That signal was seen by the pilots, and answered every purpose that it would have done if it had been set at the mast-head. But it communicated to the pilots no information which they did not already possess. They knew the vessel was in danger, and had acted upon that knowledge from the time they first approached her to the period when they went to the relief of the steamer. Two or more of them admit that

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the vessel was so near the beach that they did not deem it prudent to round her stern ; and I am satisfied from the evidence that the leeward position of the vessel had more influence in deterring the pilots from boarding her, than the absence of the signal, or the omission to hail by the officers and crew. They were acquainted with the anchorage, and knew the dangers which surrounded the vessel ; and if they had been disposed to go to her relief, or had thought it prudent so to do, it is incredible to suppose that they would have been deterred from so praiseworthy an act by the absence of a signal, or the failure of the crew to hail. Had they been ignorant of the peculiarities of the place, or if they had had any sufficient reason to suppose that the master was well acquainted with his situation, there might be some merit in this excuse. Neither of those reasons, however, has any foundation in the fact, and, in view of all the circumstances, this ground of defence must be overruled. For these reasons I am of the opinion that the relief prayed for in the bill of complaint ought to be granted, and when the amount to be recovered is ascertained, the complainants will be entitled to a decree in their favor. Should any dispute arise in ascertaining the amount, the cause must be referred to a master for that purpose.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1859.

FERDINAND CLARK v. WILLIAM H. Y. HACKETT.

Circuit Courts have no jurisdiction to review the judgments or decrees of the Supreme Court; and a Circuit Court for one circuit is equally destitute of authority to review a judgment or decree of a Circuit Court in another circuit ; but *semble*, a judgment or decree of the Supreme Court, affirming a judgment or decree of a Circuit Court, may be reviewed in a Circuit Court, upon proof that both judgments or decrees were obtained by fraud.

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Where fraud is charged in the bill, and positively denied in the answer, a decree cannot be pronounced for the complainant on the testimony of a single witness, without some corroboration either from the testimony of other witnesses, or from the circumstances proved in the case.

Under the act of Congress, August 19, 1841, limiting suits by or against assignees of bankrupts to two years after the cause of action accrued, a bill filed after two years cannot be regarded as an amendment to one for the same cause of action, filed before the expiration of the two years, but dismissed by the court.

THIS was a bill in equity, wherein the complainant sought to set aside and annul a certain decree of the Supreme Court of the United States of America, affirming on appeal a decree of the Circuit Court of the United States for the District of Columbia, and also to set aside the decree of the Circuit Court so appealed from and affirmed. Those decrees were made in a suit in equity, in which one Benjamin C. Clark and the present defendant were complainants, and Ferdinand N. Clark, then known as Ferdinand Clark, was respondent. In the published decisions of the Supreme Court, in the case of *Ferdinand Clark v. Benjamin C. Clark et al.*, 17 How. 315, it appears that the complainant prosecuted a claim against the Republic of Mexico, for the unlawful seizure of the cargo of the schooner Louisiana, and that there was awarded to him therefor the sum of \$86,985.29 by the commissioners appointed under the treaty of April 11, 1839, with that Republic.

After deducting some twenty per cent, as compensation to the agents employed in recovering the claim, there was left the sum of \$69,429.14 as the amount in controversy in that suit. That award was made on the 15th of April, 1857, and on the 15th of May following Benjamin C. Clark, of Boston, filed a creditor's bill in the Circuit Court of the United States for the District of Columbia, claiming the fund for himself and other creditors of the respondent, who had taken the benefit of the bankrupt law on the 27th of March, 1843, in the District Court of the United States for the District of New Hampshire.

On the 30th of the same May, W. H. Y. Hackett, the respondent in the present suit, and the then assignee in bankruptcy of the respondent in that suit, filed his bill in that court, also claiming the entire fund for the purpose of distribution

among the creditors of the bankrupt, alleging the decease of the original assignee in bankruptcy, and setting up his own appointment in his place. In that bill the complainant, who is the present respondent, set forth his own appointment as assignee in bankruptcy in the place of one John Palmer, deceased, and prayed for leave to come in under the prayer of the original bill, and to be made the complainant in that suit. He then alleged that the respondent, the present complainant, was regularly declared a bankrupt in 1843, and that all his property vested in the assignee, who subsequently deceased, with proceedings in bankruptcy still pending ; that the bankrupt had a claim against the Republic of Mexico, to satisfy which claim the award was made ; that the claim was not described so as to render it available to the bankrupt's creditors, and that no such evidences as would enable the assignee to recover the claim were put into his hands, leaving the assignee ignorant of the true value of the assets, and that the assignee therefore reported them to the court as of no value ; that no right, title, or interest in the claim ever passed out of the assignee or became vested in the bankrupt ; that the bankrupt had subsequently prosecuted the claim in his own right, falsely and fraudulently claiming that his own debts in bankruptcy had been satisfied, and that the claim had been re-vested in him ; and finally the complainant in that suit alleged that the award belonged to him as the assignee of the bankrupt's estate. Whereupon he prayed for an injunction under the eighth section of the act of Congress of March 3, 1849, and for general relief. The answer in that suit averred that the claim against the Republic of Mexico was described in the schedule in the manner prescribed by the rules of the District Court, and that it was mentioned as subject to a mortgage, and that no value was then set upon the claim, because he then believed it was without value. The answer further set up that the respondent communicated to the assignee the situation of all the claims mentioned in his schedules ; that all the papers and evidences in support of the claims were not in his possession, but had been in the year 1842, or earlier, publicly filed before the commissioners under the convention of April 11, 1839, were afterwards placed in the

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public archives of the government, and there remained till the time of the award. The proceeding in the bankrupt court were then set forth in the answer, and the discharge of the bankrupt on December 17, 1844. Then the answer alleged that on March 14, 1845, the assignee filed a petition to sell the estate described in the bankrupt's schedules, and that, in pursuance to an order made to that effect, the estate and demands of the bankrupt were afterwards sold at public auction to R. M. Clark; that the respondent, on the day following the sale, purchased all the estate and demands from the said R. M. Clark, and that he afterwards prosecuted this claim at his own expense. On the 20th of June, 1847, the Circuit Court of the United States for the District of Columbia issued an injunction restraining the Secretary of the Treasury from paying the amount of the fund, and the respondent from receiving it till the further order of the court. On the 30th of May, 1853, the Circuit Court decreed that the fund should be paid to W. H. Y. Hackett, as assignee, for distribution among the creditors of the respondent. From that decree the respondent appealed to the Supreme Court of the United States, and in the December term, 1854, the decree of the Circuit Court was affirmed. Among the questions discussed at the bar in that suit, and included in the pleading, was whether the sale of the claim of R. M. Clark, and the purchase of the same by the respondent on the following day, was fraudulent or valid, and it was determined in the Supreme Court to be fraudulent.

The conditions of the pleadings, and the allegations therein in this suit, are sufficiently expressed in the opinion of the court.

H. B. Fernald and C. W. Tuttle, for complainant.

Hackett, prose.

CLIFFORD, J. Both the Circuit Court and the Supreme Court, in their respective spheres of judicial action, had undoubted jurisdiction of the cause and the parties, and their determination of the matter is final and conclusive, unless it be shown, in due form of law, that their respective decrees were procured by the fraud of the complainant in that suit. Circuit Courts have no jurisdiction to review the judgments or decrees of the Supreme Court

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in any case, and a Circuit Court for one circuit is equally destitute of authority to review or in any manner to revise the judgments or decrees rendered or passed by a Circuit Court for another circuit. They can only be reviewed on writ of error, or on appeal to the Supreme Court. Such obvious truths need only to be stated in order to command universal assent as self-evident propositions, so much so that any attempt to support or fortify them by argument or authority would be quite out of place. It is not upon any such grounds that the complainant in this suit seeks redress for his alleged wrongs. The charge against the respondent is, that the respective decrees pronounced in that suit were procured by fraud as alleged in the bill, and it is upon this ground alone that he prays that they may be set aside and annulled. Some reference now becomes necessary to the pleadings in this suit, in order that the causes of complaint and their nature may become more fully understood.

According to the allegations of the bill, the complainant filed his petition in bankruptcy on the 28th of January, 1843, and was declared a bankrupt on the 22d of March following, and on the 7th of December, 1844, a decree of the District Court was passed, discharging him from the debts he owed in his private right at the time of presenting his petition. On the 22d of March, 1843, John Palmer was appointed assignee of his property, rights, and credits, and on the 14th of March, 1845, the District Court decreed a license to the assignee to sell the assets of the bankrupt, and on the 9th of April, in the same year, the assignee sold all his assets at public auction to one R. M. Clark, for the sum of two dollars, and on the 14th the complainant purchased the same under a formal and sufficient bill of sale from the auction vendee for a valuable consideration. Among those assets so purchased, as the complainant alleges, was a certain claim against the Republic of Mexico, for the unlawful seizure of the cargo of the schooner Louisiana, for which claim he admits the commissioners under the treaty aforesaid awarded him the sum of \$86,786.29, payable from the treasury of the United States, on the 15th of May, 1857. He then alleges that one Benjamin C. Clark of Boston, falsely claiming to be one of

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his creditors by virtue of a certain pretended judgment, did on the 15th of March, 1851, petition by bill the Circuit Court of the United States for the District of Columbia, for an injunction to restrain the Secretary of the Treasury from paying him the fund until the further order of the court. That judgment which is particularly described in the bill he alleges was obtained against him by the fraud and collusion of the attorney employed to defend the suit, and therefore he avers that it is void. B. C. Clark, in his bill before mentioned, prayed that the then assignee, or such other as should be appointed, might come in under the prayer of the original bill and be made the party complainant in that cause. In that connection, the complainant in this cause alleges that one Charles G. Nazro, the copartner of Benjamin C. Clark, falsely pretending that the copartners were creditors of his estate in bankruptcy, on the 19th of May, 1851, petitioned the District Court of the United States for the District of New Hampshire for the appointment of an assignee instead of John Palmer, deceased, praying that the respondent in this suit, or some other person, might be appointed as such assignee, and falsely representing at the same time that John Palmer left assets unsold, and that recent occurrences had given them value, and that the District Court, on the same day, decreed that the respondent be appointed assignee for the purpose prayed in the petition. Upon receiving that appointment as assignee, the complainant alleges that the respondent, on leave granted by the Circuit Court of the United States for the District of Columbia, was made complainant in that cause, under the prayer of the original bill filed by Benjamin C. Clark, and that such proceedings were had in that suit so prosecuted by the respondent, that on the 28th of March, 1853, the said Circuit Court did decree that the fund, less twenty per cent, paid to the agents who prosecuted the claim, be paid over to the respondent as such assignee, to be by him distributed among the creditors of the complainant. He further alleges that he appealed from the decree of the Circuit Court to the Supreme Court of the United States, and that such proceedings were had in the Supreme Court, that the decree of the Circuit Court was affirmed. That fund was then received by

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the District Court of the United States for the District of New Hampshire, as the complainant alleges, and still remains in its custody under that decree.

Such is the substance of the stating part of the bill. Certain denials are then made by the complainant, which it becomes important to notice. He denies that he owed the judgment in favor of B. C. Clark, or any part of the same since the filing of his petition to be declared a bankrupt, and repeated the allegation that it was obtained by fraud and collusion. He also denies that any debt was due to Nazro and Clark on the 28th of January, 1851. On the contrary, he avers that they were indebted to him, and he also denies that John Palmer, as assignee, left unsold any of the assets, but avers that he closed and ended all the business appertaining thereto on the 9th of April, 1845. His theory is that all the proceedings in bankruptcy were closed by the original assignee, and he accordingly alleges that the respondent was not authorized to set aside the proceedings of the former assignee, and in so doing that he exceeded the authority of the court, and being deceived by the false representations of others, misrepresented the facts to the Circuit Court of the United States for the District of Columbia, and to the Supreme Court, by which false representations, and by the fraud and collusion of his own counsel, both courts, not knowing the real facts, were induced to decree, and did decree, that the fund should be paid over to the respondent. That claim, as he alleges, was considered valueless at the date of his petition to be declared a bankrupt, and continued to be so considered up to the time of its sale by the original assignee, and would not have been allowed by the commissioners but for his great skill and effort in prosecuting it, wherefore he claims that he was equitably entitled to the whole amount. He then sets forth the evidences on which he relies, to show that the judgment of B. C. Clark, described in his creditor's bill, was obtained by fraud and collusion. They consist chiefly of the alleged fraudulent and collusive conduct of the attorney employed by him to defend the suit in which the judgment was rendered. According to the allegations of the bill, his attorney was seasonably employed, duly instructed how to

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prepare and conduct the defence, and well knew that the complainant was ready and willing to aid and assist when called on for that purpose, and yet, as he alleges, his attorney fraudulently colluded and conspired with the plaintiff in that suit, and others in his interest, and fraudulently abandoned the defence, so that he was defaulted. These matters he admits were not pleaded in defence in the Circuit Court of the United States for the District of Columbia, and the reasons why they were not he alleges to be that he was fraudulently instructed by his counsel that the proceedings in bankruptcy, together with the sale of the assets by the original assignee, were a perfect and complete bar to that suit. Other minor matters are then set forth as showing the motive of some of the parties implicated, or the inducement which prompted them to aid in procuring the appointment of the respondent as assignee. On this point he alleges that Charles H. Dougherty and Michael Dougherty respectively claimed certain portions of the fund, on account of services alleged to have been rendered in getting it allowed, which he refused to admit, and that the latter said if he did not comply he would tie up the fund in Washington so that the complainant would not get any part of the award. Prompted solely by the reason that he refused to allow those claims, the complainant charges that Charles H. Dougherty and Michael Dougherty, and Joseph Hopkins Stewart, and one John L. Hayes, afterward his counsel, and the respondent, intending and combining to defraud the complainant out of his just rights and to deprive him of the benefits of the award, conspired and confederated together, and, as the means of the final consummation of their designs, caused the proceedings before mentioned to be instituted in the District Court of the United States for the District of New Hampshire, and by misrepresentation fraudulently induced that court to appoint the respondent assignee, and as further means of consummating their designs, caused the original proceedings to be commenced in the Circuit Court of the United States for the District of Columbia, and also caused the respondent to present his bill in that court, and become a party complainant in that cause. As a more effectual means of accomplishing their

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designs, he alleges that one of them offered his professional services to him, to act for him in the conduct and management of his defence, and that being ignorant of their purposes, he did retain and employ him to prepare and conduct his defence, but that he so aided and assisted the adverse party by keeping out material matters of defence contrary to his instructions, that the court decreed the case against him and granted the prayer of the bill. After stating in detail the several evidences so withheld, and specifying the several fraudulent acts, omissions, and conspiracies of his counsel in preparing and conducting his defence, he avers that he was ignorant of all those fraudulent acts, omissions and conspiracies of the parties named, until after the decree of the Supreme Court affirming the decree of the Circuit Court, and until after the final decree. Wherefore he prays that the decree of the Supreme Court affirming the decree of the Circuit Court, and the decree of the Circuit Court ordering the fund to be paid to the respondent as assignee, and enjoining the Secretary of the Treasury from paying the same to the complainant, may be set aside and annulled, and for other relief. On the 15th of August, 1857, the respondent appeared and filed his answer. Having already determined that this court possesses no jurisdiction to review the decree either of the Supreme Court or of the Circuit Court, it will only be necessary to refer to such portions of the answer as are responsive to the charge of fraud and collusion as set forth in the bill. Those allegations of the bill can only affect the respondent in this suit, and no one of the other persons implicated in the suggestions of fraud has become, or in any manner been made, a party to this proceeding. Separate denials are introduced into the answer to each distinct charge of fraud. They are full, clear, and explicit, and in respect to each subject-matter embraced in the bill are as comprehensive as the charge. Actual fraud, when charged as in this case, is of course issuable, and as in all other cases where it is directly imputed, the burden of proof lies on the party who seeks to set aside the proceedings. Stronger evidence may be required to satisfy the court of the truth of a fact, irrespective of the effect of the answer in cases of fraud, than in other issu-

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able matters in controversy, whether at law or in equity, but the fraud must be established by fair and reasonable inferences to be drawn from the facts proved, and unless it is so established the case fails, and the transaction rests unimpaired. *Askam v. Barker*, 19 Eng. L. & Eq. 529. Charges of actual fraud, unsupported by evidence showing the truth of the imputations, if denied by the answer, are of no avail, for the plain reason that fraud is not to be presumed in any case without proof, and he who makes the charge has the burden of proof to establish the imputation. Superadded to that general rule, which is applicable in all cases whether at law or in equity, is another equally salutary, which is peculiar to hearings in equity upon bill and answer, and that is, where the charge as made in the bill is positively denied in the answer, a decree cannot be pronounced for the complainant on the testimony of a single witness, without some corroboration either from the testimony of other witnesses or from the circumstance proved in the case. In equity the established rule is that an answer, responsive to the allegations and charges made in the bill, and which contains clear and positive denials thereof, must prevail unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and such attendant circumstance as will supply the want of another witness, and thus control the statements of the answer, or show its incredibility or insufficiency as evidence. 3 Greenl. Ev. § 289; *Daniel v. Mitchel*, 1 Story, 188; *Hughes v. Blake*, 6 Wheat. 453; *Lenox v. Prout*, 3 Wheat. 520.

Separate denials to each and every charge of fraud as made in the bill are contained in the answer, and in language as clear, positive, and explicit as could well be chosen, and in addition thereto the respondent declared that he wholly denies that he has at any time, for the purposes set forth in the bill or for any purpose conspired or confederated with the persons therein named, or any or either of them, to consummate any design in respect to the complainant, or the award, or any matter or thing charged in the bill. That denial is repeated and enlarged when the respondent says he wholly denies that he has confederated, conspired, or combined with any person or persons whether named

or not named in the bill, in any way to defraud, injure, or prejudice him, or to deprive him of the award or any part thereof, or to influence the conduct of any person or persons retained or to be retained as counsel for the complainant in any or either of the suits mentioned, or in any other matter whatsoever. These references to the bill and answer are sufficient to show what the state of the pleadings is in the particular under consideration, and the result is, that the burden of proving the charges of fraud against the respondent as made in the bill is upon the complainant, according to the rule of law already laid down. Without repeating the charges of fraud as alleged in the bill, it will be sufficient to say that, so far as the respondent in this suit is concerned, not one of them is made out by any testimony in the case. Seven witnesses were examined by the complainant, and, after a careful perusal of their depositions, it is not perceived that there is anything in their statements, or the exhibits accompanying the same, which has any tendency to show, either that the decree of the Circuit Court of the United States for the District of Columbia, or the decree of the Supreme Court affirming the same, was procured by or through any fraud practised by the respondent. This conclusion renders it unnecessary to enter upon a separate consideration of the several propositions assumed by the counsel for the complainant on this branch of the case, as the answer already given applies to them all, and as their separate examination would only serve to protract this investigation without accomplishing anything particularly beneficial to either party, it will be omitted. Recurring to the pleadings in this suit, there, is not alleged in the bill so much as one fact deemed material to the decision of the controversy in its present stage, which is not directly met by the respondent and emphatically denied in the answer. Such positive denials in the answer, inasmuch as they are directly responsive to the charging part of the bill imputing actual fraud, must be considered by every rule of equity pleading as an insuperable barrier to any recovery by the complainant, unless those denials are overcome by competent and sufficient evidence. *Eyre et al. v. Potter*, 15 How. 56; *Price v. Berrington*, 7 Eng. L. & Eq. 254. No such evidence has been

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exhibited by the complainant, and as this court has no power to grant relief under the circumstances of this case, except upon the ground of fraud, the prayer of the bill must be denied.

Another ground of defence assumed by the respondent deserves to be considered, for the reason that if tenable, it furnishes a complete answer to the suit, not only in its present form, but in any form in which it may be hereafter brought. By the eighth section of the Bankrupt Act of the 19th of August, 1841, it is among other things provided that no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid in any court whatever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall have first accrued. Assuming the facts to be true as they are stated and charged in this bill of complaint, the cause of action in this suit accrued at the time when the complainant became possessed of the knowledge of the fraudulent acts, omissions, and conspiracies whereby the persons named in the bill procured the respective decrees which he now seeks to have set aside and annulled. In his bill the complainant alleges that he was ignorant of those fraudulent acts, omissions, and conspiracies until after the decree of the Supreme Court affirming the decree of the Circuit Court, and until after the final decree. It is conceded by the counsel on both sides, that the decree of the Supreme Court affirming the decree of the Circuit Court went into operation as early as the 7th of May, 1855. On that day the fund was paid over to the District Court of the United States for the District of New Hampshire, under the final decree of the Circuit Court of the United States as affirmed by the Supreme Court, and it is admitted in argument by the counsel for the complainant that the limitation, if it applies at all, commenced to run from that date. Payment of the fund could not have been made until after the final decree in the Circuit Court, and the bill in effect admits that after the final decree the complainant became informed of the fraudulent acts, omissions, and conspiracies whereby those respective decrees had been procured. It is

clear, therefore, that the limitation commenced as early as the 7th of May, 1855, when the fund was paid over to the bankrupt court, for distribution among the creditors of the complainant. As appears by the record, the bill in this suit was filed on the 19th of June, 1857,—more than two years after the cause of action accrued. Three propositions are assumed by the counsel for the complainant in answer to this ground of defence. In the first place, they insist in effect that so much of the answer as sets up this limitation as a bar to the suit is not properly before the court. No such defence was set up in the answer as originally filed on the 15th of August, 1857. A motion to amend the answer in this particular was made at the October term, 1858, and the amended answer was filed on the 1st of March following, which was duly allowed in court on the 16th of the same month. That motion was addressed to the discretion of the court, and being one which it was competent for the court to allow, it must be considered that it was duly and properly allowed. In the amended answer, the respondent set up the limitation in the act of Congress before mentioned, and claims the same benefit of the provision as if he had pleaded the same, and the only question is whether it constitutes a bar to the suit.

It is insisted by the counsel for the complainant that it is not a bar because the respondent is not now, and was not at the time the decrees were pronounced, the legal assignee of his bankrupt estate. Their argument on this point assumes that his appointment was procured by fraudulent misrepresentations, as charged in the bill. It overlooks the important and controlling fact that all these charges of fraudulent misrepresentations as made in the bill are particularly and emphatically denied in the answer, and, being unsupported by any sufficient proof, cannot avail. In the absence of competent and sufficient proof to sustain the allegations of fraud when thus denied, it must be assumed, on the principles already explained, that the appointment was legally and properly made, and if so, then it is obvious that the proposition cannot be maintained.

One other branch of the argument only remains to be considered, and in respect to this last proposition a few words will be

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sufficient. It is insisted that the present bill is no more than an amendment to an original bill filed in this court on the 18th of March, 1856, which was subsequently dismissed by the court. Regarding the proposition as directly contradictory to the record in this suit, it cannot be sustained. As already remarked, this bill was filed in court on the 30th of June, 1857, and is in theory and fact an original bill, as clearly and fully appears by the record, which cannot be contradicted. *King v. Robinson*, 33 Me., and cases cited. Suits, whether at law or in equity against an assignee in bankruptcy, under the act of Congress of the 19th of August, 1841, by any person claiming an adverse interest touching the property or rights of property of the bankrupt's estate, must be brought within two years after the cause of action shall have first accrued, and if not so commenced within that time, that provision of the act of Congress, if well pleaded, constitutes a complete bar to the suit. This suit was not commenced within the two years after the cause of action first accrued, and therefore is not maintainable.

On both grounds I am of the opinion that the suit cannot be maintained, and the bill is hereby dismissed with costs.

RHODE ISLAND DISTRICT.

JUNE TERM, 1859.

GEORGE W. CROSS *v.* MARIA LOUISA A. DE VALLE *et als.*

A court of equity will not interfere to declare future rights which may arise under a will. The rule which prevails at common law, that an alien can take lands by purchase, though not by descent, prevails also in equity.

Where an interest in real estate is devised to an alien, he will be entitled to hold the same until the State shall interpose its prerogative claim.

THE complainant in this case was the devisee of certain property described in the will of Thomas Lloyd Halsley, of Providence,

under certain contingencies specified in the will of the testator. All that portion of the property which was the subject of controversy was devised and directed to be placed in trust, in the hands and possession of John C. Brown and Moses B. Ives of Providence, and the survivor of them, in fee-simple, with directions to pay over the rents, income, and profits to the natural daughter of the testator, one Maria Louisa A. De Valle, who then resided with her husband in Buenos Ayres, for and during the term of her natural life, upon her sole and separate receipt therefor, and for her sole and exclusive use. The testator then directed the trustees to convey to the eldest son of his daughter living at the time of her decease, if he shall have arrived at the age of twenty-one years and have complied with certain conditions as to his change of name and residence, one half of the property included in the devise to his daughter, and the other half to the remaining children. The will also provided for the contingency of the minority of the eldest son at the decease of his mother, as well as for the event of the son's failure to comply with the conditions of the legacy. Further provision was also made in the will for the event of there being no sons of the said Maria Louisa, in which case the testator directed that the property should be conveyed to his granddaughters, to share and share alike.

But in case Maria A. De Valle should die without lawful issue living, or male issue only, who should die before arriving at the age of twenty-one years, or should leave issue, all of whom should neglect or refuse to comply with the conditions before expressed, then the property was to be conveyed to the complainant upon similar conditions, should he then be living, and subject to certain special legacies. Maria Louisa A. De Valle was shown in the record to be a native of Buenos Ayres, and at the death of the testator was domiciliated there, with her husband Raimondo De Valle. When the bill was filed, she was the mother of one son, and two other children were subsequently born in the State of Rhode Island. The surviving trustee, Maria Louisa A. De Valle and her husband and children, and the heirs at law of the testator, were made parties to the suit as respondents.

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The object of the bill was to obtain from the court a decree to declare the trusts of the will, and that the trusts in favor of Maria Louisa A. De Valle and her children, so far as they related to real estate situate in Rhode Island, might be declared void and of no effect, and incapable of being enforced, on account of the alienage of the said Maria Louisa A. De Valle and her children; also that the trusts in the will, so far as the same related to said real estate, be hastened in enjoyment, by such failure of the trusts made in the will in favor of said Maria Louisa and her children; and that the trustees be decreed to convey the same to the complainant upon his compliance with the conditions of the will. Demurrers to the bill were filed by the trustees, the guardians *ad litem* of the children of Maria Louisa A. De Valle and her husband. The cause stood for hearing upon the demurrers.

A. Payne and *C. Hart*, for complainant.

T. A. Jenckes and *B. R. Curtis*, for De Valle and the trustees.

R. Curtis and *S. Currey*, for heirs at law.

CLIFFORD, J. On this state of the case the first inquiry to be made is, as to the limit to the jurisdiction of this court in declaring the trusts of a will upon the suit of a person interested in the dispositions. This question was so fully considered in the case of *Langdale v. Briggs* on appeal, and reported in 39 Eng. L. & Eq. 194–214, that it would be merely to repeat what is there said, to enter upon an extended consideration of it at the present time. Several questions were there presented, and among the number the one whether the court, in a case like the present, would declare future rights and give directions accordingly, pursuant to the prayer of the bill of complaint. But the court declined to interfere in that behalf, and Lord Justice Turner held that a court of equity had no power to make such a declaration. His remarks upon the subject are so entirely applicable to the case before the court, that we prefer to give them in his own language. Responding to the counsel who had urged the point, he said: “The argument on the part of the appellant in support of his claim to have his rights declared and directions

given with respect to them, even assuming his interest to be reversionary merely, was so strongly pressed at the bar that I think it right in the first place to state my opinion on that point, the more so as it is certainly a point of much importance with reference to the course and practice of the court, and, I may perhaps add, to the law of the country. As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they come into possession. In all cases, within my experience where there have been tenancies for life, with the remainder over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. The practice has been so familiar to me, that I confess myself to have been surprised at the length to which the argument on the part of the appellant was carried on that point." Various considerations were urged in support of the proposition, and in the course of the argument the great convenience and advantage it would be to parties to have their future rights ascertained and declared, were much pressed upon the court by the counsel of the appellant. To that suggestion the learned judge replied in effect, that the question was not one of discretion, but deeply affected the law of the court; that the course and practice in such cases constituted the law of the court; and added: "I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the legislature to alter it, and I am far from thinking that, to some extent at least, the legislature might not usefully interpose and provide some remedy for the ascertainment of future rights; but I think if this be done at all, it should be done by the legislature, as the legislature alone can fence the measure with the protections which will obviously be required; and such a measure, if adopted, ought not to be confined to mere equitable rights. . . . Generally speaking," he concludes, "I apprehend that it is not according to the course of the court to declare future rights." In the case of *Jackson v. Turnly*, 21 Eng. L. & Eq. 13, the Vice-Chancellor held that the court will not entertain a suit merely for the purpose of declaring

that a person who claims to have a right which may arise hereafter, has no such right. Believing these principles to be correct, we shall confine the decision at the present time to the single question whether the equitable interest of Maria Louisa A. De Valle is null and void in consequence of her alienage, so that the persons who have interests in remainder have the right to be hastened in their enjoyment of the estate. Other questions discussed at the bar will not now be considered, for the reason that the opinion on this point will dispose of the case made in the bill of complaint. Had the dispositions of the will in her favor been of a legal estate for her life, it is very clear that it could not have been declared void on account of her alienage. All the authorities agree that at common law an alien can take lands by purchase, though not by descent, or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle, say the Supreme Court, has been settled in the year-books, and has been uniformly recognized as sound law from that time. Nor is there any distinction whether the purchase be by grant or by devise ; in either case the estate vests in the alien, not for his own benefit, but for the benefit of the state ; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seised into the hands of the sovereign. But until the lands are so seised, the alien has complete dominion over the same. *Fairfax v. Hunter's Lessee*, 7 Cran. 619. Assuming this principle to be correct, of which there can be no doubt, it would seem to follow almost as an inevitable consequence that the same rule must prevail in equity. It is a principle of equity that equitable estates shall be subject to the same modes and conditions as corresponding legal estates, and it could hardly be, in a case like the present, that the consequences of a purchase by an alien of an interest in land would so far differ as to be valid or invalid accordingly as the estate was legal or equitable. Support to the proposition that equity recognizes no such distinction, is to be found in the decision of the courts as well as in the standard works of elementary writers upon the subject. A trust of lands, says Mr. Lewin, may be declared in favor of an alien, but cannot

be enforced by him for his own benefit, it being contrary to law that an alien should plead or be impleaded touching lands in any court in the kingdom, and the king, on inquest found, will be entitled to the trust by forfeiture; for the mischief is the same as if the alien had purchased the lands themselves. But the forfeiture vests not in the king the legal estate, but merely transfers to him the right of suing a subpoena against the trustee in equity. A distinction, says the same author, has been taken, that although, when a trust is perfected in favor of an alien, the crown may be entitled, yet when a trust in favor of an alien is not *in esse*, but only *in fieri* and executory, the court will do no act to give it to an alien who by law cannot hold. Lewin on the Law of Trust, 43. This subject was discussed with much learning and ability in the case of *Hubbard v. Goodwin*, 3 Leigh, 492, by the Court of Appeals of Virginia; and the court sustained the conclusion that a trust estate acquired by an alien is acquired for the state, and that a court of equity will compel the trustee to execute the trust for the benefit of the state. To the same effect also is the case of *Barrow v. Wadkin*, 24 Beav. 1, which arose on a devise to the widow of the testator for life, and after her decease to the defendant Wadkin in trust for Elizabeth Barrow so long as she should be the wife or widow of John Barrow, for her sole and separate use without power of anticipation, and after her decease or marriage, upon trust for the children of John and Elizabeth Barrow. Elizabeth Barrow and her children were aliens. On this state of facts the question was, whether the trustees, the heir at law, or the crown took the estate. Sir John Romilly, the Master of the Rolls, gave the opinion, in which he went into a lengthened and careful investigation of the whole subject. Without repeating his remarks, it will be sufficient to say that his conclusions are similar to those of the Court of Appeals of Virginia to which reference has already been made. He dissents, however, from the distinction alluded to by Lewin, in the closing part of the extract we have made from his work. These authorities, in our opinion, are conclusive to show that, conceding the allegations of the bill, Maria Louisa A. De Valle is an alien, and that the will conveys

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an interest in real estate which she cannot hold, and that no treaty between the United States and the Argentine Confederation is applicable to the case to corroborate her title, that nevertheless no one or all of these considerations can be productive of any benefit to this complainant. She is entitled to hold the estate until the State of Rhode Island shall interpose her prerogative claim. Under these circumstances, we do not consider it necessary or proper to inquire or decide whether the interests disposed of in favor of the respondents are subject to that claim, either upon the terms of the will or of the treaty. Those questions will necessarily arise in case the State of Rhode Island should deem it suitable to present her claim, and to institute a suit to try the right.

Demurrer allowed.

MASSACHUSETTS DISTRICT.

JUNE TERM, 1859.

THOMAS BLANCHARD v. CHANDLER SPRAGUE.

Parties to a suit in equity are not competent witnesses in their own behalf, under the existing legislation of Congress, in the Circuit Court.

When a patentee knowingly and for a considerable length of time acquiesced in the use of his patented machine by another, who had previously constructed and used the same by his permission, and actually and voluntarily accepted a compensation for such use from the person in possession, as just payment for such use, those acts of the patentee were held to be evidence from which a license may be inferred, unless controlled by other facts and circumstances.

And where, as in this case, the only reservation made when the payment was received, was the right on the part of the patentee to claim an additional sum for such use of the machine, it cannot be held that the acts of the respondent in using the machine under such circumstances, prior to the time when such payment was made, were unlawful.

Where a party in accepting a certain rate of tariff on articles manufactured by his patented machine, reserved the right to claim a certain additional tariff on such articles, and claimed that by reason of such reservation he was entitled to receive such additional tariff as compensation for the use of his machine, *held*, the claim furnished no ground for

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an injunction, presupposing, as it did, that the use of the machine was not unlawful, but presented a case on which the complainant had an adequate remedy at law.

Wherever a contract is made in relation to patent rights, which is not provided for and regulated by an act of Congress, the parties, in case of dispute, stand upon the same ground as other litigants in respect to the jurisdiction of the court.

THIS was a bill in equity brought by Blanchard, who was a citizen of Massachusetts, against Sprague, who was a citizen of the same State. The bill charged the respondent with the infringement of certain patent rights owned by the complainant, and prayed for an account and for an injunction. The pleadings and testimony disclosed the following facts: January 20th, 1820, letters-patent were issued to Blanchard for a machine for cutting irregular forms, such as shoe-lasts and boot-trees. Various acts of Congress were passed extending the patent, by the last of which it was renewed for fourteen years, from January 20, 1848. Prior to the year 1851 the respondent, with the permission of the complainant, constructed one of his machines, and used it in the manufacture of shoe-lasts and boot-trees under a written license for one year, renewable yearly, at a tariff of one and one half cents for each article manufactured, payable quarterly. Renewals had been omitted some years, but the tariff had been regularly paid and received without objection. The license contained a provision that the complainant might raise the tariff from one and one half cents to two cents, upon giving six months' notice. July 15th, 1857, the complainant notified the respondent of his intention to restrain him from using the machine, unless he should, on or before January 20th, 1858, obtain a new license from the complainant, in which the rate of tariff should be two cents instead of one and one half. Nevertheless the respondent continued to use the machine up to the time of the filing of the bill and afterwards, and the complainant voluntarily received from him the tariff of one and one half cents at the end of each quarter up to April 1st, fifteen days after the bill was filed. The tariff for the last quarter was received after a tender of it had been once refused, with the proviso expressed in the receipt given for the same, that it was received without thereby waiving the right, if any he had, to recover one half cent more for

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each last turned. Much testimony was introduced tending to show that the complainant had waived his right to increase the tariff; but from the view of the case taken by the court, it is not necessary to reproduce it here. The depositions of the complainant and of the respondent were both taken to be used as evidence in the case. Counsel for respondent objected to the deposition of the complainant, on the ground that he was interested in the event of the suit. After argument, the parties agreed that, if this objection were sustained by the court, the deposition of the respondent should also be considered as having been objected to.

Lemuel Shaw, Jr., and *Sidney Bartlett*, for complainant.

J. P. Healey and *B. R. Curtis*, for respondent.

CLIFFORD, J. By the general rules of law, the parties to a suit, being interested in the event, are not competent to testify in their own favor, and there is no law of Congress relieving them from that disability. In trials at common law, the laws of the States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, furnish the rules of decision in the Federal courts in cases where they apply. It is expressly so provided in the thirty-fourth section of the Judiciary Act, and it has been so held by the Supreme Court on so many different occasions, that the point cannot now be regarded as open to dispute. *McNeil v. Holbrook*, 12 Pet. 89; *Wayman et al. v. Southard et al.*, 10 Whea. 1; *McKeen v. Delancy*, 5 Cran. 31; *Polk's Lessee v. Wendell*, 9 Cran. 98; *Thatcher v. Powell*, 6 Whea. 127; *McCluny v. Silliman*, 3 Pet. 277. Beyond question, therefore, State laws furnish the rules of evidence in the Federal tribunals in civil cases at common law, subject to the exception specified in the Judiciary Act. Parties are made competent witnesses in civil suits by the laws of Massachusetts, and consequently they are so, subject to the exceptions before mentioned, in the Federal courts holden in that district in trials at common law. But the chancery jurisdiction, practice and rules of evidence in the Circuit Courts of the United States are the same in all the States, and no State statute upon the subject has been adopted by any law of Congress, unless that

construction be given to the provision of the Judiciary Act already recited. Suits in equity are plainly distinguished from trials at common law in the Constitution, and they are so distinguished in a very pointed manner in repeated instances in the Judiciary Act. They are so, in the first place, in the eleventh section of the act which describes and defines the jurisdiction of the Circuit Courts. By the language of the section, jurisdiction is conferred upon the Circuit Courts in suits in equity as something in addition to suits of a civil nature at common law. So also, in the twenty-second section, it is provided that judgments and decrees in civil actions and suits in equity may in certain cases be re-examined and reversed or affirmed in the Supreme Court. Actions at common law are also pointedly distinguished from causes in equity and of admiralty and maritime jurisdiction by the thirtieth section of the same act, and from its whole tenor I am satisfied that the thirty-fourth section of the act does not control the question under consideration. It was held by the Supreme Court in *United States v. Reid et al.*, 12 How. 363, that the language of this section cannot, upon any fair construction, be extended beyond civil cases at common law as contradistinguished from suits in equity, and in that opinion I entirely concur. Judge Story held in *Boyle v. Zacharie et al.*, 6 Pet. 658, that the chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and that the rules of decision are the same in all. That principle was not a new one when it was thus announced, for it had previously been held by the same court in *United States v. Howland*, 4 Whea. 115, that as the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in the other States; and that principle was subsequently reaffirmed in *Neves et al. v. Scott et al.* 13 How. 272, and appears to be the settled law of the Supreme Court. For these reasons I am of the opinion that the parties to a suit in equity under the existing legislation of Congress, are not competent witnesses, and the depositions both of the complainant and respondent are accordingly suppressed.

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Having disposed of this preliminary question, I will now proceed to consider the case upon its merits. Under the admissions of the respondent, as contained in the answer, a *prima facie* case is made out for the complainant, so that the decision of the controversy must turn upon the matters set up in defence. As alleged in the answer, and not controverted by the complainant, the case shows that, for several years prior to the 1st of December, 1851, the respondent had been using, by the permission of the complainant, one of the patented machines, at North Bridgewater, in the State of Massachusetts. That machine was constructed under his own superintendence, and at his own expense, and he had used it under an agreement, or understanding, with the complainant, that he should pay therefor a tariff of one and one half cents for each and every shoe-last or boot-tree turned by him with the same. Under that arrangement, the tariff of one and one half cents for each last and boot-tree manufactured was to be paid quarter-yearly, at the end of each quarter; and it is not controverted that those payments were regularly and constantly made, pursuant to the terms and conditions of the agreement. Similar arrangements had also been made by the complainant with six other persons, each of whom had constructed a machine, and had respectively been using it for several years prior to the period before mentioned, paying therefor the same tariff to the complainant. Those agreements were made in the first instance to continue for one year, with the stipulation for a renewal of the same by the complainant from year to year for the period of seven years, provided the licensee had not, in the mean time, committed any breach of the terms and conditions, but with the right, on the part of the complainant, upon giving six months' notice of his intention, to increase the tariff to a rate not exceeding two cents for each last and boot-tree, if, in his opinion, the interests of the patent should require it. Some of those licenses were granted as early as the fall of 1847, and others bear date as late as the 20th of January, 1848. They are all substantially alike, and in most instances the stipulation for renewal was enlarged either by an indorsement on the agreement, or by a separate instrument, and ex-

tended to the term of fourteen years from the time the agreement commenced to operate. On the 5th of June, 1851, the complainant, under a certain contract in writing, sold to James M. Quimby the exclusive right and privilege of making, using, and vending his machines for certain purposes therein specified, in all the States and Territories of the United States, excepting the right to make lasts and boot-trees in the New England States. Shoe-lasts and boot-trees manufactured by machines, patented in this country, were at that time, it seems, imported here from the British Provinces, so that it became desirable, in the view of the complainant and others interested in his patent, to procure, if possible, the passage of a law by Congress prohibiting such importation. Accordingly, he solicited contributions from his licensees in this State to defray the expenses in making the application to Congress for the passage of such a law. Upon that ground, and with that view, he applied to the respondent, and the other licensees similarly situated, for such contributions, and in consideration thereof agreed with him and them, if they would pay over to James M. Quimby the sum of eight hundred dollars, towards defraying the expenses of such an application; that whenever such a law was passed and approved, he would not, during the continuance of his patent, increase the number of licenses to manufacture lasts within the territory of New England, east of the Connecticut River. That agreement, however, was made upon the further condition that those then having such licenses should supply all the lasts wanted in the territory therein described. Pursuant to that agreement, the respondent subscribed one hundred dollars, and the remaining six persons, or firms, subscribed seven hundred dollars; but no such law was ever passed by Congress, and of course the promisors did not become liable, under their subscriptions, to pay the respective sums by them subscribed. Afterwards, towards the close of the following year, the terms of this agreement were modified, or rather a new one was made in its stead, which was not reduced to writing. During the interval that elapsed, the licensees, before named, continued to use their respective machines in the manufacture of lasts and boot-trees in the territory embraced in their district,

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paying therefor, as they had done before, a tariff of three cents a pair, or one and one half cents for each and every piece of last or boot-tree by them manufactured. Efforts were made, in the mean time, to procure the passage of a law by Congress, such as is described in the original agreement, but without success. Towards the close of the year 1852, a second application for money to prosecute the undertaking was made by one of the agents who had that subject in charge. He applied, in the first place, to the complainant, and was by him referred to the licensees for the manufacture of lasts and boot-trees, affirming that it was for their interests to contribute, for the reason that he was going to allow them to run their respective machines during the continuance of the patent, without charging them more than three cents a pair for the articles by them manufactured. They declined to contribute until the proposed law should be enacted, without satisfactory assurance, from the complainant, that they should receive something of value for their money. At the request of the agent, several of the licensees accompanied him to the dwelling-house of the complainant, and there had an interview with the latter in the presence of that agent. That interview resulted in a new agreement, or a modification of the one previously made, in writing, and is to the effect, as proved by the witnesses, that the licensees should pay the eight hundred dollars towards defraying the expenses of procuring the passage of the proposed law ; and that the complainant, in consideration thereof, should not charge them but three cents a pair for the lasts and boot-trees by them manufactured, whether the bill passed or not. Such of the licensees as were not present on the occasion were duly notified of the arrangement by their associates, and they approved and ratified it, and the whole amount of the subscription was subsequently paid, pursuant to the agreement. All of these facts are substantially and satisfactorily proved by two or three witnesses, and they accord in substance and effect with the allegations of the answer. Half or more of the amount specified was paid about the time the last agreement was made, and the remainder of the eight hundred dollars was paid as it was wanted for the purpose for which it had originally been subscribed.

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Attempts were made to discredit the statements of the witnesses called to substantiate these facts, but so clearly without success that any further analysis of the testimony is deemed unnecessary. After that interview, the licensees went on using their respective machines without interruption or complaint, paying therefor the tariff of one and one half cents for each and every last and boot-tree by them turned, as they had done from the commencement, and continued so to do until the 15th of July, 1857. On that day, the complainant notified the respondent of his intention to restrain him from using the machine, unless he should obtain a new license from the complainant, on or before the 20th of January, 1858, in which the rate of the tariff to be paid should be two cents, instead of one and one half cents, for each and every last and boot-tree by him manufactured. Similar notices were also given by the complainant about the same time to the other licensees. But they have all continued to use their respective machines up to the present time, and the complainant has voluntarily received from each of them the tariff of one and one half cents for each and every last and boot-tree by them manufactured, at the end of each quarter, up to the 1st of April, 1858, and in some instances to a later period. Evidence was also introduced by the respondent, showing that the complainant has, in repeated instances, acknowledged since those notices were given that these licensees had the right to run their respective machines, by paying that rate of tariff within the territory of their district, claiming only, that if they did not do so, and did not supply the market, he had a right to license others to manufacture the same articles. Tender of the amount of the tariff, due for the quarter ending the 1st of April, 1858, was duly made by the respondent to the complainant on the day it became payable. At that time, it was refused by the complainant; but on the 19th of the same month, he wrote to the respondent, informing him that his tender would be received and receipted for, at one and one half cents for each last, not however waiving the right, if any he otherwise had, to an additional half-cent for all lasts turned after the 20th of January, 1858, if the court should sustain the validity of that claim.

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Payment was accordingly made of the amount previously tendered on the 24th of April, 1858, as alleged in the answer, and the complainant gave a receipt to the respondent for the same, acknowledging in the receipt that the sum so paid, amounting in the whole to one hundred and sixteen dollars and thirty-five cents, was one and one half cents for every last turned by the respondent with the machine in question for the quarter ending the 1st of April, 1858, but repeating substantially the reservation made in his letter, signifying his willingness to accept the tender. Another fact of considerable importance in this investigation ought not to be overlooked in this statement. All of these licensees got up their own machines, and severally constructed them at their own expense, by the permission of the respondent. To that extent the agreement is executed, and the answer, testimony, and exhibits clearly show that it was fully executed for every purpose when the bill was filed, at least up to the 20th of January, 1858, which is nearly five years after the last agreement was made, under which the eight hundred dollars were finally paid. For every hour the machine was used by the respondent, within the period laid in the bill of complaint, and for fifteen days since the bill was filed, the complainant has received from the respondent the tariff of one and one half cents for each article manufactured by him with the machine, and all he now claims is that he is entitled to an additional half-cent for such of those articles as were turned by him subsequently to the 20th of January, 1858. Notwithstanding the allegations of the bill of complaint are so framed that they charge the respondent, as an infringer of the complainant's patent, it is apparent, from the whole case, that the real controversy between the parties arises solely out of the claim to recover the additional half-cent for each article manufactured, in the nature of rent, which the complainant insists is due to him for the use of the machine since the 20th of January, 1858. On this state of facts, I am of the opinion that the relief prayed for in the bill of complaint ought not to be granted in this suit, for the several reasons which will now be stated and briefly explained.

In the first place, the facts and circumstances clearly show

that, for the whole period laid in the bill of complaint, the machine in question was used by the respondent under the license or permission of the complainant, which of itself is a complete answer to the prayer for relief. Suppose it be admitted, as is assumed by the complainant, that he had the right to revoke the license whenever the interests of the patent required it, and that his determination to do so was properly and seasonably made known at the time he gave the notice, it still appears, from his own acts, conduct, and declarations, that he acquiesced in the subsequent use of the machine by the respondent to the present time. Four witnesses testify in effect that the complainant admitted, after the notices were given, that these licensees had the right to run their respective machines during the continuance of his patent by paying the tariff of one and one half cents for the articles by them manufactured, declaring at the same time, however, that if they did not supply the market or turn all that were wanted, he should sell more rights. He also stated to those witnesses that he did not intend to make these licensees pay the additional rate, admitting, as before, that they had the right to run their respective machines, but said that they must make all the lasts that were wanted, or he should license others. As before remarked, he has received from this class of licensees the tariff of one and one half cents for every article turned to the time of filing the bill, and for fifteen days afterward, and all the reservation he made in his letter to the respondent, dated the 19th of April, 1858, was the right to claim an additional half-cent on such articles as were turned subsequently to the 26th of January in the same year. When a patentee knowingly, and for a considerable length of time, acquiesces in the use of his patented machine by another, who had previously constructed and used the same by his permission, and actually and voluntarily accepts a compensation for such use, from the person in possession of the machine as part payment for such use those acts of the patentee are evidence from which a license may be inferred, unless controlled by other facts and circumstances; and where, as in this case, the only reservation made, when the payment was received, was the right, on the part of the patentee, to claim an additional

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sum for such use of the machine, it cannot be held that the acts of the respondent, in using the machine under such circumstances prior to the time when such payment was made, were unlawful, and consequently an injunction under those circumstances will not be granted. Applying this principle to the case under consideration, it is obvious that the relief prayed for in the bill of complaint cannot be decreed on the facts disclosed in the testimony of the witnesses and the exhibits in this case, for the reason that the allegation in the bill, that the acts of the respondent were unlawful, is not sustained.

Another reason may be given why relief cannot be granted in this case, which is equally decisive of the question, so far as respects the real matter in controversy between these parties. It is a suit, in point of fact, to recover an additional half-cent for the articles manufactured by the respondent within the reservation contained in the letter and receipt of the complainant before mentioned. No dispute arises in the case under any act of Congress, nor does the decision depend in any respect upon the construction of any law of Congress in relation to patents. On the contrary, it arises entirely out of the agreement, express or implied, for a license, and the rights of the parties depend altogether upon the ordinary rules of law, and the general principles which regulate and control the decision of the court in equity suits. What the complainant really claims is that he terminated or revoked the license under the agreement which previously existed between the parties by giving the notice, and that the respondent subsequently continued to use the machine without any stipulation as to the rate of tariff. In accordance with this theory, he assumes that, in accepting the one and one half cents from that date to the filing of the bill, he reserved the right to claim and recover an additional half-cent for all such articles as were manufactured by the respondent within that period, and that by virtue of that reservation he is entitled to recover that amount in addition to what he has received as a reasonable compensation for the use of the machine. Looking at the claim from that point of view, and it is the one in which it is presented by the evidence, it furnishes no ground whatever for an injunction, for the reason that it pre-

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supposes that the use of the machine was not unlawful, and presents a case, on the facts disclosed, for which the complainant has a plain and adequate remedy at law. But suppose it were otherwise, and that his remedy in equity would be more effectual, and that it was a fit case for equity cognizance, it would not benefit the complainant in this suit, for the reason that it does not depend in any degree whatever upon any act of Congress respecting patent rights. Whenever a contract is made in relation to patent rights which is not provided for and regulated by an act of Congress, the parties, if any dispute arises, stand upon the same ground as other litigants in respect to the jurisdiction of the court. *Wilson v. Sandford et al.*, 10 How. 100. Both these parties are citizens of the same State; and if the pleadings corresponded with the real nature of the controversy, it is clear beyond dispute that this court could have no jurisdiction of the case. *Goodyear v. Day*, 1 Blatch. 565. Jurisdiction is not controlled, however, solely by the pleadings. But the case itself must be one within the cognizance of the court where the suit is brought. Where it appears at the trial that there is no question involved in the case which it is competent for the court to decide under the pleadings, the cause must be dismissed, notwithstanding the allegations of the bill may be sufficient to authorize the court to take cognizance of the suit. In this case it appears by the bill of complaint that both complainant and respondent were citizens of the State of Massachusetts at the time the bill was filed; and as there is no question involved in the controversy giving the court jurisdiction on account of the subject-matter of the suit, I am of the opinion that the relief prayed for in the bill of complaint cannot be granted. On both grounds, therefore, the bill must be dismissed.

Eddy Street Iron Foundry v. The Hampden Stock and Mutual Fire Insurance Co.

RHODE ISLAND DISTRICT.

JUNE TERM, 1859.

EDDY STREET IRON FOUNDRY v. THE HAMPDEN STOCK AND MUTUAL FIRE INSURANCE COMPANY.

When a policy of insurance contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the material statements in the answers of the applicant are thereby changed from representations into warranties.

A warranty is a stipulation forming a part of the contract, and is construed as a condition. Warranties, unless strictly complied with, will invalidate the insurance, whether they are or not material to the risk.

Where property described as contained in a certain building was insured, that description being made a part of the contract, is material, and the insured cannot recover for the loss by fire of such property while in a building other than the one thus described.

THIS was an action of assumpsit upon a policy of insurance. The suit was originally commenced in the State court, but on motion of the corporation defendants was removed to this court, under the twelfth section of the Judiciary Act. From the pleadings and evidence, it appeared that insurance was effected by Arnold C. Hawes, A. B. Hawes, and Ira N. Stanley, doing business under the firm name of Hawes and Stanley, and that the policy was issued to them in their firm name.

The persons comprising the firm were interested in certain tools, stock, flasks, cupola, fixtures, and patterns, contained in the rear of No. 82 Eddy Street, in Providence, to the value of eight thousand dollars, and were so interested until they were incorporated under the name of the Eddy Street Iron Foundry, and then under the corporate name were so interested until the said property was destroyed by fire. The first policy to the firm was taken out on the 30th of December, 1853, and was for fifteen hundred dollars for one year. At the expiration of the year it was renewed for another, that is, till December 30, 1855, at

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which time the plaintiffs had become incorporated. The property was destroyed by fire on the 5th of January, 1856. After the incorporation the policy was renewed in the name of the treasurer of the company, for a year from December, 1855.

In the application of the policy, which was in writing, the patterns, cupola, and furnace were stated to be in a building in the rear of No. 82 Eddy Street, used by the applicants as a furnace house.

By the terms of the policy the application was made a part of that instrument. When destroyed by fire in January, 1856, the property was not in the furnace-house, but in a storehouse, which could not properly be described as standing in the rear of 82 Eddy Street, but in the rear of 82 and 84 on that street. At the November term, 1857, the parties went to trial upon the general issue, and under the instructions of the court the jury returned a verdict for the defendants, whereupon the plaintiffs moved that the verdict be set aside, and a new trial granted, for the following reasons : —

1. Because, in the construction of the several instruments which contained the evidence of the contract of insurance in said cause, the court were requested to rule that “warranties are only to be found in answer to special interrogatories”; which ruling the court refused to give.

2. Because the court were requested to rule upon the instruments aforesaid, that all else which might be found in them, except in answer to special interrogatories, and responsive to such interrogatories, concerning the property to be insured and its situation, are representations merely, and that it is a question of fact for the jury to say whether or not such representations were concerning matters material to the risk aforesaid by the defendants; which ruling and instruction to the jury the court refused to give.

3. Because the court were requested to rule and to instruct the jury, that the omission to state the description of the building containing the property burnt, and in which the property described as the subject of insurance was stored, while not in use, in the furnace building, if such an omission was found to exist,

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was an omission to state a fact which might or might not be material to the risk, and that the question of such materiality was one of fact to be left to, and ascertained by, the jury ; and that although the description in the representation may differ very considerably from the actual state of the property insured, if such variation were not fraudulently intended, and did not in fact affect the rate of insurance, or change the actual risk, it can scarcely be deemed material ; which ruling and instruction the court refused to give.

4. Because the court were requested to rule and to instruct the jury, that in special risks upon personal property which are the matters of special contract, the question of materiality is always a fact for the jury ; and it is for them to say whether the omission to describe the building, if such omission existed, was a misrepresentation or concealment which affected the risk, and thereby avoided the policy ; which ruling and instruction the court refused to give.

T. A. Jenckes, for plaintiffs.

C. S. Bradley, for defendants.

CLIFFORD J. None of the instructions given by the court are the subject of complaint, nor are they reported on the motion for a new trial. Under the circumstances, it must be assumed that they were correct. Had the instructions given been reported, there would be much less difficulty in determining whether the requests offered by the plaintiffs were properly refused. Without the means of comparing the one with the other, some reference to the facts of the case becomes indispensable, in order that the precise nature of the questions presented may be clearly understood. No change was made in the terms and conditions of the policy, or in the description of the property insured, from the time the policy was made and issued, to the time of the loss. When the period for which it was first given had expired, it was extended without any alteration of its terms, and upon the express condition that the application upon which the policy was originally predicated should continue valid and in force. These remarks apply to the second extension as well as the first, so that the rights of the parties in this controversy depend upon the true

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construction of the policy when taken in connection with the original application. Some discrepancy exists as to the articles of property insured, and as to the distribution of the amount of the insurance between the policy and the application on which it is founded ; but that discrepancy does not affect any question now presented for decision. Insurance was in fact made to the amount of fifteen hundred dollars, as follows: one hundred and fifty dollars, on stock manufactured and in process; seven hundred and fifty dollars, on tools and flasks; six hundred dollars, on fixtures, cupola, and patterns, situated in rear of 82 Eddy Street, Providence. At the argument it was agreed that the loss, consisting chiefly of patterns, was confined to property contained in a storehouse situated on the premises of the plaintiffs, and that the property was not contained in the furnace building, situated in rear of No. 82 Eddy Street. On both sides, it was conceded that the furnace building, specified in the application, is situated directly in the rear of No. 82 ; and it appeared at the time, that the storehouse which contained the property lost was separate from the furnace building, and would be well described as situated in rear of Nos. 82 and 84, on the same street, and would not be properly described as situated in rear of No. 82. Nothing can be more certain than the proposition that the policy, under the circumstances of this case, must be read in connection with the application which forms a part of it, and when so read, it is equally clear that, by its true construction, it describes the property insured as all contained in the furnace building. That conclusion rests upon the express statements of the answers to the second and third interrogatories in the application, and upon the admitted fact that the true description of the furnace building corresponds to the one circumstantially given in the answer to the third interrogatory. From the course of the argument, it was also conceded that the situation of the furnace building is correctly described in the policy as in rear of No. 82, and it was not controverted that the description of No. 82, as given in the answer to the second interrogatory of the application, is correct. By the terms of the policy, the insurance was predicated upon the application, which is ex-

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pressly declared therein to be a part of the policy. Twelve interrogatories were propounded to the applicants, all of which were duly answered. Of these, three only of the questions and answers need be given: — *Interrogatory one.* State the character and kind of property to be insured. To which the applicants answered as follows: cupola, furnace, stocks, tools, fixtures, flasks, engines, and patterns. — *Interrogatory two.* Where is it situated? *Answer.* In the rear of new stone and brick building on Eddy Street, Providence. — *Interrogatory three.* Of what materials is the building constructed; age, size, height, and condition, and for what purpose occupied, and by whom? *Answer.* Brick; attic, wood; slate roof; new, one story high, no floor; furnace by applicants. — Those questions and answers, when taken in connection with the terms of the policy, make it clear we think, that the property insured was understood by the parties to be contained in the furnace building. When parties have deliberately put their engagement into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, says Mr. Greenleaf, that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and parol evidence is not admissible to vary, enlarge, or contradict the terms of such an instrument. Construction can go no further, even in cases of doubt, than to ascertain the real intention of the parties; and that intention must be collected from the language employed as applied to the subject-matter and the surrounding circumstances. Every writing undoubtedly where the language is doubtful may be read by the light of the surrounding circumstances, in order more perfectly to understand the true intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. 1 Greenl. Ev. sec. 275–277. Every written instrument, as a general rule, must be construed by the court, and not by the jury. That rule is so firmly established, that it would be quite out of place to cite authorities in its support. It has certain exceptions and qualifications, but none of them have any application to the present case.

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Having ascertained the facts of the case, so far as necessary in this investigation, we will now proceed more immediately to the inquiry, whether the instructions requested were properly refused.

Certain principles in the law of fire insurance have become too well settled to be any longer the subject of dispute. Parties to a policy of insurance may agree as to the materiality of the statements of the applicant, and such agreements, if made a part of the contract, will be respected by courts of justice. Accordingly, when the policy contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the material statements in the answers of the applicant are thereby changed from representations into warranties. In such a case the application is to be taken as a part of the contract of insurance, in the same manner as it would be if incorporated into the policy itself. *Battles v. York Co. Mut. Fire Ins. Co.*, 41 Me. 208; *Burritt v. The Saratoga Co. M. F. Fire Ins. Co.*, 5 Hill, 188; *Jennings v. Chenango Co. Mut. F. Ins. Co.*, 2 Den. 82; *Smith v. Bowditch M. F. Ins. Co.*, 6 Cush. 449; *Sillem v. Thornton*, 26 Eng. L. & Eq. 238; *Hayward v. The New England Mut. F. Ins. Co.*, 10 Cush. 444; *Wilbur v. Bowditch Mut. F. Ins. Co.*, 10 Cush. 448; *Wellcome v. The People's Eq. Mut. F. Ins. Co.*, 2 Gray, 480.

Representations are collateral statements of facts incidental to the contract; but a warranty is a stipulation forming a part of the contract, and is construed as a condition. All statements contained in the policy itself are *prima facie* warranties, while extraneous statements are in general regarded merely as representations, even when made formally in writing, and in answer to written or printed questions propounded by the insurers. Such statements, when not introduced into the policy, are ordinarily regarded as collateral to the contract, but they may undoubtedly, according to all the authorities, be incorporated with it by agreement, and then they cease to be mere representations, and become warranties. Mere reference to a representation, in a policy of insurance, will not necessarily make it a part of the contract, or render it absolutely binding on the insured; for the

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intention may, and sometimes will, be presumed to be, to put its existence as a representation beyond question, and not to give it another and more unfavorable character. *Gates et al. v. The Madison Co. Mut. Ins. Co.*, 3 Barb. 73; *Same v. Same*, 2 Comst. 43; *Same v. Same*, 1 Seld. 469. But when the representations of the insured are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer. *Williams v. The New England M. F. Ins. Co.*, 31 Me. 219; *Jennings v. The Chenango M. F. Ins. Co.*, 2 Den. 75; *Murdock v. The Chenango M. F. Ins. Co.*, 2 Comst. 210; *Lee v. The Howard F. Ins. Co.*, 3 Gray, 592. Even when the reference to the statements of the insured is not such as to render them warranties, as when they are expressly referred to as representations, it will still be *prima facie*, if not conclusive, evidence of their materiality to the risk, and render any misrepresentation or concealment in making them fatal to the right of recovery against the insurer. *Houghton v. The Man. M. F. Ins. Co.*, 8 Met. 114; *Burritt v. The Saratoga M. F. Ins. Co.*, 5 Hill, 82; *Vose v. The Eagle L. & H. Ins. Co.*, 6 Cush. 42; *Davenport v. The New England M. F. Ins. Co.*, 6 Cush. 340; *The Glendale Woollen Co. v. The Protection Ins. Co.*, 21 Conn. 19.

Evidence to show a misrepresentation or a concealment must be submitted to the jury, and in general the question whether the misrepresentation or concealment was material or not is an inquiry of fact, and not of law. *Livingston v. Delafield*, 1 Johns. 522; *Walden v. The New York Firemen's Ins. Co.*, 12 Johns. 138.

None of these principles, however, precisely touch the questions involved in the motion. What we have to determine in this case is, the construction of the contract, which in point of fact has nothing to do with any question of misrepresentation or concealment. By the terms of the policy, when read in connection with the application which forms a part of the policy, it appears that certain property therein described as contained in a given building, was insured. That building was situated on the

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premises of the plaintiffs, and not only contained property of the description mentioned in the policy, but was owned and occupied by the plaintiffs for the purposes described in the application. Place and situation, therefore, as given in the application, constituted an essential element in the description of the property insured ; and as that description is a part of the contract, it was necessarily material, for it was the property so described, and no other, that was included in the risk. No one, we presume, will contend that all the property of that class owned by the plaintiffs, without regard to place or situation, was included in the policy. Such a construction of the contract would be both unjust and unreasonable, and therefore cannot be adopted. If it be admitted that the terms of the contract are not broad enough to include all such property of the plaintiffs, then there is no other sensible construction which can be adopted consistently with the language employed, except the one which restricts its meaning to the property contained in the furnace building, as described in the application. To suppose that the policy covered all such property of the description mentioned as was situated on the premises of the plaintiffs, would be to make a new contract for the parties, instead of expounding the one they have made for themselves, as there is not a word either in the policy or application which authorizes any such construction. Having come to this conclusion as to the construction of the contract, it necessarily follows that the several prayers for instruction were properly refused.

Motion overruled.

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MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1859.

JOSEPH BURKE, Libellant and Appellant, v. THE BRIG M. P. RICH,
GEORGE H. BLANCHARD *et als.*, Claimants.

Semble. Although the assignee of a bottomry bond may maintain a suit in admiralty in his own name, yet he may also sue in the name of his assignor.

Held, that a suit brought in the name of the assignor will be maintained where the real parties in interest appeared in the progress of the suit and filed a supplemental libel, which was answered by the respondent, and then the parties proceeded to issue and trial.

There must be a twofold necessity for raising money to justify a master in raising it on bottomry ; there must be a necessity of obtaining repairs or supplies, in order to prosecute the voyage ; and there must be a necessity of resorting to this method to obtain the money, from inability to procure the required funds in any other way.

Hypothecation of the vessel can only be made in a foreign port ; but in the jurisprudence of the United States all maritime ports, other than those of the State where the vessel belongs, are foreign to the vessel.

Although it is true that proceedings on a bottomry bond must be instituted within a reasonable time, yet the maritime law will not suffer the lien to be affected by the mere departure of the vessel from the return port, with or without the knowledge of the holder of the bond.

Where an assignee of a bottomry bond took a mortgage of the vessel on which the bond was given, to secure money loaned, but it did not appear that any of the money was included in the mortgage for the payment of the bond, *held*, that his rights were not affected.

THIS was an appeal from a decree of the District Court in a cause of bottomry. It was a suit *in rem*, instituted by the appellant to recover the amount of a certain bottomry bond upon the brig, given by the master. The vessel sailed from New York for the port of Darien in the State of Georgia, thence to Gaudaloupe in the West Indies, thence to return to New York ; but in consequence of disasters was compelled to put into the port of Savannah for repairs, where the master was obliged to resort to a loan on bottomry to obtain the necessary funds. Thereupon, pursuant to an agreement with the master that he would give him such a bond, the libellant advanced eleven hundred dollars to repair the

vessel. The bond was dated December 11, 1857. Payment was to be made within five days after the arrival of the vessel at New York, and more than that time having elapsed, the libellant claimed to recover seventeen hundred dollars, according to the conditions and terms of the bond. The answer set up that the vessel, after being repaired, proceeded on her intended voyage, and when completed she returned to the port of Savannah, where the bond and claim of libellant were fully satisfied by the agent of the vessel.

As a further defence, it was alleged that the vessel subsequently made another voyage from Savannah to Havana and other West India ports, and thence to New York, and that the master, who was then a part owner, conveyed to the claimants one quarter of the vessel, before she sailed for Boston. It was also averred that the suit was being prosecuted by certain part owners for their own benefit, in fraud of the claimants' rights.

The libellant filed a supplemental libel, in which it was denied that the bond was ever paid, and alleged that the amount paid by Charles and J. Peters was advanced by them, not as agents of the vessel, but at the request of Howland, Hinckley, & Co., who were not, and had never been, owners, but only mortgagees of a portion of the vessel; that the advance was made on joint account of all those parties to save the vessel from arrest; that the assignment was made to the parties first named for the security of all of them; and that Howland, Hinckley, & Co. subsequently paid the whole amount when the bond was assigned to them for the entire sum, and that this suit, though in the name of the libellant, is prosecuted for their sole interest and benefit. To the other grounds of defence set up in the answer, the libellant pleaded that the transfer of one quarter of the vessel to the claimants, if any such was made, was not absolute, but only collateral, on account of a pre-existing debt, and was made with full knowledge on their part that the bond still existed in full force, and was still due and unpaid, and to be enforced.

In their answer to the supplemental libel, the claimants alleged that the supposed assignees received a bill of sale of five eighths

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of the vessel, in consideration, among other things, of the payment of the amount of the bond, and that the pretended assignment was a fraud upon the claimants. They also denied that the bill of sale was a mortgage, but averred that it was absolute on its face, and that the supposed mortgagees held themselves out to be owners of five eighths of the vessel.

Howland, Hinckley, & Co. also filed a supplemental libel, alleging that they never received a bill of sale of any part of the vessel except as follows: the owners of the vessel being indebted to them in the sum of thirty-seven hundred dollars on account, the libellants, on May 1, 1858, or about that time, sent to the agent of the owners a bill of sale, to be executed by the owners to them, with the view to secure that sum and certain other sums due from the owners to certain other creditors, amounting to \$4,500. The bill of sale was executed for that purpose, but was accompanied by a bond of defeasance, executed by them, and designed to be delivered to the owners at the same time; and it was delivered to the owners, and was by them retained.

In this libel, it was also alleged that the bond to them was *bona fide*, and for a valuable consideration, and it was denied that its prosecution was a fraud upon the claimants. To all these allegations, the claimants filed another answer.

They denied the necessity of hypothecation of the vessel, and averred that the first assignees of the bond were the agents of the owners, and that the advance made by them was designed to prevent the libellant from proceeding against the vessel. A final joint reply was made by all the libellants.

It appeared from the evidence that, when the bond was given, the master, by whom it was executed, owned one fourth of the vessel, subject to a mortgage to one Jesse Braddick, to secure a promissory note for \$1,080, and the other three fourths were owned by parties residing at Tremont, Maine. The mortgage bore date November, 1857.

The vessel was disabled between New York and Darien, and, as alleged, put into Savannah for repairs. Twenty-two hundred and fifty dollars were expended in the repairs, and it did not appear that a less sum would have answered the purpose. The

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master first notified the owners, and requested assistance, and he wrote to Howland, Hinckley, & Co., and to C. & J. Peters, in New York, to ascertain if they would furnish the funds for the repairs. From the owners, he received answer that they could do nothing to aid him, and, from the parties in New York, a draft for four hundred dollars, but this he could not negotiate. Having no means of his own, he then advertised for a loan on bottomry, but, finding no bidders, he engaged to give the bond to the libellant. The vessel went first to Darien, thence to Point Peter, Gaudaloupe, thence to Trinidad, thence to St. Mary's in the State of Georgia. From St. Mary's she went to Havana, thence to Sagua La Grande, thence to New York, thence to Boston. It was clearly proved, that the owners were indebted to Howland, Hinckley, & Co. for materials furnished to complete or equip the vessel. It also appeared that C. & J. Peters had acted as brokers in negotiating the charter for the voyage.

On the return of the vessel to St. Mary's, they received information that she was about to be sold at auction to satisfy the bond, and communicated the same to the first-named parties, suggesting that, unless they took measures to have the bond transferred from the libellant, they would lose their claim.

Howland, Hinckley, & Co. replied that they would advance half the necessary sum, if their then correspondents would advance the other half. The transfer was made to the Messrs. Peters, April, 1858, but equally for the benefit of the other parties. In September following, Howland, Hinckley, & Co. paid the other half, and took an assignment of the bond from the first assignees, and this suit was prosecuted in the name of the libellant for their benefit. In the District Court, a decree was entered dismissing the libel.

Scudder and Randall, proctors for libellant and appellant.

S. C. May, proctor for respondents.

CLIFFORD, J. Several objections were made by the respondents to the right of the libellant to maintain this suit. In the first place, it is insisted that the suit is brought in the name of the wrong party, and that it cannot be maintained in the name of the libellant. That objection rests upon the proof that the

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libellant has parted with his interest in the bond, and upon the admitted fact that the suit is prosecuted in his name, for the benefit of the assignees and present holders of the same. If it was an action at law in the common-law courts, it would be well brought, and indeed could be maintained in no other way. All the authorities cited by the respondent admit that the assignee of a maritime contract may, in certain cases, enforce his rights in the admiralty by a suit in the name of the party to whom the promise was made, and from whom he derived his rights. For example, it is said, in *Fretz et al. v. Bull et al.*, 12 How. 468, that the party entitled to relief should always be made libellant, and that the practice of instituting the suit in the name of one person for the benefit of another only obtains in the admiralty in particular cases. But the same court admits that all persons entitled on the same state of facts to participate in the relief may join as libellants, whether the suit be *in personam* or *in rem*. Benedict Adm. 386. Doubts have often been expressed whether a suit can be maintained against a carrier by a consignee who has no beneficial interest in the goods. Whether so or not, it is well settled that the presumption is that he has an interest, and to defeat the right to sue in his own name the *prima facie* presumption must be rebutted by proof. *Lawrence et al. v. Minturn*, 17 How. 100. Mr. Parsons says a bottomry bond is generally regarded in the admiralty as a negotiable instrument, or interest, which, being transferred in good faith, and for a valuable consideration, may be put in force by the holder in his own name. In the case of *The Rebecca*, 5 C. Rob. 103, the warrant was taken out by the merchant, who having subsequently become an alien enemy during the progress of the suit, its prosecution was suspended, but not until the respondent had pleaded that fact in answer to the suit. An attempt was afterwards made by the attorney to revive the prosecution for his own benefit, alleging that the bond had been transferred to him, and that the obligee had become bankrupt. While the learned judge, who gave the opinion, admitted that a bottomry bond was a negotiable instrument, he nevertheless, in the argument of the opinion, put a case by way of analogy, which goes very far to show that the proceed-

ings may be carried on in the name of the original party. A contract of hypothecation made by the master, says Mr. Abbott, does not transfer the property of the ship, but only gives the creditor a privilege, or claim upon it, to be carried into effect by legal process. Such a contract, says the same learned commentator, is one of those matters technically called choses in action, and therefore the duty created by it is not assignable at common law, so as to enable an assignee to sue upon it in his own name, or to make it subject to a set-off, although it may be available in a court of equity. In the admiralty, he says, a bottomry bond is a negotiable interest, which may be transferred, and put in issue by the person so acquiring it. Abbott on Ship. p. 154. No doubt is entertained that a bottomry bond, in a qualified sense, is a negotiable interest, and that it is competent for the assignee to enforce payment in the admiralty in his own name. But it is not a negotiable instrument, in the broad sense in which that term is employed, as applied to bills of exchange and promissory notes. *Thompson v. Dominy*, 14 M. & W. 406. None of the cases decide that the assignee may not maintain the suit in the name of the original obligee of the bond, and it is difficult to see any reason connected with the obligor for the opposite rule. His rights are not thereby impaired, and it is not perceived that any undue advantage is secured to the assignee. Be that as it may, still in this case the real parties in interest appeared in the progress of the suit, and filed a supplemental libel, setting forth all the grounds of their claim. Answer was made by the respondents to the supplemental libel, and the parties proceeded to issue and trial. All the parties are before the court, and full justice may be done in the premises. Under these circumstances, and in view of the state of the pleadings, I am of the opinion that this objection cannot be sustained.

It is objected by the respondent, in the second place, that the bond is invalid, because there was no such necessity in the case as authorized the master to make it.

Maritime hypothecations had their origin in the necessities of commerce, and are said to be the creatures of necessity and distress. They are of a high and privileged character, and are held

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in great sanctity by maritime courts. 1 Conkl. Adm. (2d ed.) 266. Such contracts, said Lord Stowell, in the case of *The Kenersley Castle*, 3 Hagg. Adm. 7, were intended for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the master and the owners are without credit, and where, unless assistance could be procured by means of such instruments, the vessels and cargo must perish. But the master is not the owner of the property, so as to have a right to bind it at his own will and pleasure. Hypothecation of the vessel by the master is only authorized when based upon necessity, and the required necessity is twofold in its character. It must be a necessity of obtaining repairs or supplies, in order to prosecute the voyage, and also of resorting to such a loan, from inability to procure the required funds in any other way. If the master has funds of his own or of the owner in his possession, or within his control, or if he can, by any other reasonable means, procure them upon his own credit or that of the owners, or by advances on the freight, or by passage money, he is not at liberty to resort to a bottomry bond. *The Hersey*, 3 Hagg. Adm. 407; *The Fortitude*, 3 Sumn. 234; *The Active*, 2 Wash. 226; 1 Conkl. Adm. 269; *The Aurora*, 1 Whea. 102; *Thomas v. Osborn*, 19 How. 31. Such hypothecation can only be made by the master in a foreign port, but the term "foreign port," in the jurisprudence of the United States, includes all maritime ports other than those of the State where the vessel belongs. Applying these principles to the present case, it is obvious that the objection under consideration is wholly without merit. Disabled as the vessel was, and unable to leave the port in her crippled condition, the necessity for repairs was pressing and urgent. Her master had no means of his own or of the owners, within his control, and he and they were alike without credit in the port of distress. Notice to the owners brought neither assistance nor the promise of assistance, and neither the creditors of the vessel, nor the brokers who negotiated the charter, were able or willing to furnish any available funds. All other resources failing, the master, as was his duty in the emergency, promised to hypothecate the vessel; and having obtained the loan

upon the faith of that promise, and made the repairs, he executed the bond to secure its payment. Courts of justice everywhere agree that where the supplies are ordered by the master, and the repairs made, and the bond given afterwards, the bond is good, provided it was originally intended to furnish the supplies on the credit of the ship, and to secure the payment of the amount advanced in that way. *The Virgin*, 8 Pet. 552; *La Ysabel*, 1 Dod. 276; *Furness v. Brig McGown*, Olcott, 63. Tested by the strictest rules, therefore, I am of the opinion that there was a legal necessity for the loan in this case, and that the acts of the master in executing the bond were fully authorized. Unless it be so held in this case, it would be difficult to imagine on what state of facts it would be lawful for the master to hypothecate the ship, or for the foreign merchant to part with his money.

3. It is insisted that the lien upon the vessel, if any ever existed under the bond, was waived when she was allowed, after the money was due, to depart from St. Mary's, and because she sailed for Boston, after her return to New York. She did not return to Savannah, and the libel was filed shortly after her arrival at Boston. Negotiations, in the mean time, were pending between the owners and the creditors of the vessel, and the affairs of both were apparently in great confusion. Claims of this description are wisely favored by courts of justice, as an inducement to the foreign merchant to relieve the necessities of the vessel in ports of distress. Such liens go with the ship, and are often held valid after very considerable delay, yet, when the merchant, or obligee, can reasonably pursue his remedy, it is his duty so to do. If the lender omits to enforce payment for an unreasonable time, and without reasonable cause, and a third person, by purchase or levy, without knowledge of the lien, acquires the vessel, the lender will be held to have waived and lost his lien by the delay. But purchasers, who acquire the vessel, with knowledge of the existence of the lien, and that it is yet to be enforced, stand upon a different footing, and are entitled to much less favor. 1 Par. Mar. Law, 433; *The Charles Carter*, 4 Cran. 328. One of the principle reasons for requiring expedi-

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tion in the enforcement of the lien is to guard the interests of innocent purchasers who have no knowledge of its existence. Stale claims of this sort will not be enforced in the admiralty, but where there was a clear necessity for the loan, and the proceedings were instituted within a reasonable time, the maritime law will not suffer the lien to be affected merely by the departure of the vessel from the return port, with or without the knowledge of the holder of the bond. *The Brig Nestor*, 1 Sumn. 85. In this case the vessel never returned to Savannah, and it does not appear that there was any unreasonable delay in instituting the suit after her arrival at the port of return. Unreasonable delay, therefore, is not shown in this case, and it is clearly proved that the claimants, when they took their bill of sale of the master, for one quarter of the vessel, had full knowledge of the lien, and knew full well that it was yet to be enforced. Admissions to that effect were several times made by the claimant, who negotiated the bill of sale, and he several times made declarations signifying his intention to pay the bond.

4. In the last place, it is insisted by the respondents that the bond was paid, and cancelled, before the suit was instituted by the parties for whose benefit it is prosecuted. Negotiations to that effect undoubtedly were commenced, and carried on, for some time, between those parties and the agent of the owners. Those negotiations were based upon the assumption and expectation that the whole vessel was to be conveyed by the owners. One fourth of the vessel, however, belonged to the master, who was absent, in charge of the vessel. His concurrence was necessary to the consummation of the arrangement, but, inasmuch as his signature to the bill of sale could not be procured until his return, the completion of the arrangement was postponed, and was finally abandoned, by the consent of all the owners who had signed the instrument. Beyond question, it was, at one time, agreed between those parties and the agent of the owners, that the former should take a conveyance of the whole vessel, and as a part of the consideration should pay the bottomry bond. But the whole evidence shows that the proposition was never carried into effect, and the agent of the owners, to whom it was made

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expressly, testifies that it was subsequently withdrawn by the owners, and entirely abandoned. Five eighths of the vessel were owned by parties residing in the State of Maine. On the 30th of May, 1858, those parties conveyed their interest to Howland, Hinckley, & Co., by a bill of sale. At the same time, the parties last named gave back a bond conditioned that, if they should sell the interest so conveyed, they would account to the obligees for any surplus arising from such sale over and above the sum of forty-five hundred dollars and incidental expenses, and covenanting to reconvey in the case the vessel was not lost or sold upon being paid that sum and interest, either out of the net earnings of the vessel or otherwise. Some of the mortgagors deny all knowledge of the bond of defeasance; but the proof shows that it was duly delivered to one of their number, and no doubt is entertained that it speaks the true character of the transaction. That mortgage was given to secure the sum of thirty-seven hundred dollars, due to the mortgagees, for advances made to complete or equip the vessel, and for the benefit of certain other creditors of the owners. Nothing was said at the time of the negotiation, or when the mortgage was executed, about paying or cancelling the bottomry bond, and not a dollar was included in the mortgage for that purpose. For these reasons, I am of the opinion that the libellant is entitled to a decree in his favor, and that the one fourth of the vessel, owned by the respondents, is justly chargeable with the payment of the bond, in proportion to the interest which they represent.

The decree of the District Court is, therefore, reversed, with costs. Decree for libellant.

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Contracts made by the United States, through the Secretary of the Navy, to furnish provisions for the naval service, cannot be rescinded by the chief of the bureau having charge of such contracts and supplies, without the sanction of the head of the department. Evidence that the chief of such bureau informed a contractor that a written proposition to rescind such a contract, if forwarded to him, would be laid before the Secretary, is no defence to an action to recover damages for the non-fulfilment of the same, although

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it appears that the proposition was duly made, and that it was retained six months, and not answered.

If a contract is to be sought in correspondence, or if the discharge of a right or obligation is to be deduced from it, then the court, and not the jury, must construe the correspondence, although it may extend over a considerable length of time, and embrace a great variety of circumstances.

ERROR to the United States District Court of Massachusetts. The action was upon a contract dated October, 1851, for the delivery, at his own risk and expense, free of charge, to the plaintiffs, at their Navy Yard in Brooklyn, between the 1st of January, 1852, and the 1st of May of the same year, of twelve hundred barrels of pork, of a specified quality, at a stipulated price, and in case of failure that the defendant and his sureties were to pay liquidated damages.

Among other defences, the defendants pleaded as their fourth plea that, in April, 1852, they being willing to perform their contract, but plaintiffs not being ready to receive performance, the parties thereupon agreed to discharge each other. Issue was joined on this plea, and a verdict was rendered for defendants. The defendants exhibited a power of attorney from Shaw, their principal, dated May 12, 1852, to one Wilson, by which the latter was empowered to negotiate with the chief of the bureau of provisions and clothing in the Navy Department, concerning those contracts dated October, 1851, for the delivery, among other things, of pork at Brooklyn, and to renew contracts, or to annul entirely said contracts, or either of them, vary the terms of either of them, or to agree to any arrangement in his name with the chief of the bureau that he might deem expedient. The attorney had two interviews with Mr. Sinclair, the chief of the bureau. On the 18th of May, he advised his principal of the result by letter, from which the following is an extract: —

“ Mr. Sinclair says they have a good supply of pork, and should probably need no more for consumption before another summer ; and if you wish to cancel that part of the contract, he should be happy to accommodate you. I told him you had begun to provide for the pork, and would be ready to deliver it at the prescribed time, but that you were dissatisfied with the treatment you had received from the inspectors, and I felt at liberty to say you

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would accept his proposition, and give up the contract entirely. He replied he did not need the pork, and would rather it would not be delivered, as he did not wish to keep over any more than he could help. He says you must make a written proposition to him to the effect that you are desirous to give up the contract for pork, and he will lay your communication before the Secretary of the Navy; and if you are not advised to the contrary, you may consider the pork contract at an end. I am also satisfied it is a good arrangement for you, especially when you take into consideration the trouble that always occurs in regard to the inspection of government merchandise. If you like my arrangements, just write to him to that effect, and also write to me at Newport, where I hope to be in the early part of next week. I shall leave here (Washington) to-morrow, for Baltimore," &c.

In his testimony, the attorney affirmed the accuracy of this statement, and said in the second interview Mr. Sinclair stated that Shaw need not deliver the pork.

B. F. Hallett, for plaintiffs.

H. F. Durant, for defendants.

CLIFFORD, J. Upon this testimony it is difficult to find support for the plea. The attorney does not assume to agree to a cancellation of the contract, but merely solicits information whether the officer would be willing to do it, in order to communicate that fact to his principal. If the contract had been dissolved, there is no reason why the papers should not have been drawn for that purpose at that time. But the attorney refers the whole subject to his principal, and another act on the part of the principal is required before the arrangement can be treated as complete. This interpretation of these conversations receives full confirmation from the subsequent interview between the department and the defendant. On the 24th of May, Mr. Sinclair writes to him as follows: "Respecting your contract for pork, if you will make a direct proposition to the bureau, the same shall be submitted to the Secretary of the Navy for his consideration and directions in the case." Here is explicit evidence that nothing conclusive had resulted from the interview between the chief of the bureau and Wilson, at least in the opinion of the former,

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and the reply of Shaw two days afterwards is equally explicit in evincing his understanding. He says: "Your letter of the 24th instant has been received and noticed. I am now making inquiries and arrangements for beef. In regard to my contract with your bureau for pork, I will suggest for your consideration, first, to extend the time of delivery; second, to relinquish the pork contracts altogether. Waiting your early reply, I am," &c., &c. There was no reply to this letter, and no further correspondence, until the 30th of November, 1852. On that day the chief of the bureau writes to the defendant: "You are required to deliver to the Navy Yard, Brooklyn, New York, the pork in accordance with the stipulations of your contract, and should you fail to do so by the 10th of December next, the bureau will direct a purchase of such quantity as may be required at your risk and cost." The question arises here, did the failure of the department to answer the letter of the 26th of May operate a rescission of the contract, whether considered alone or in connection with the testimony of Wilson? Two alternatives were presented by the letter for the consideration of the Navy Department, in respect to the terms of an existing contract, but it retains for the writer the power to accept or reject the offer which was anticipated as the result of that consideration. Neither alternative is proposed by the writer in such a manner as to conclude himself. He reserves the right to have the last word. Nor does the testimony of Wilson put a different face upon the matter. Wilson learned from the chief of the bureau of the willingness of the head of the department to accommodate the obligor by discharging the contract, and invited a proposition for that purpose. Subsequently, in a letter to the principal, he asks for a communication on the subject. That communication was made, but no action took place upon it, and it is equally clear that the remark of the chief of the bureau to Wilson, "that he would lay the communication of Shaw before the Secretary of the Navy, and if he (Shaw) was not advised to the contrary, he might consider the contract at an end," cannot properly be incorporated into the subsequent correspondence. Shaw's letter was not written as a sequel to the communication of Wilson, nor does it properly form a part of the

negotiation commenced by him. It is an answer to a letter from Sinclair directly, and presents two distinct subjects for consideration merely, and the writer asks an early reply. Under these circumstances, it could not be maintained by the United States with any success that the omission of the chief of the bureau to examine or answer the overtures of the writer of the letter was an abrogation of the contract, either when considered singly or in connection with the testimony of Wilson ; and, in the judgment of this court, the evidence does not show a rescission of the contract by mutual consent. The plaintiffs requested the court to instruct the jury that the testimony of Wilson and the correspondence did not in law amount to a cancelling or rescinding of the contract. But the court declined so to instruct the jury, but did instruct them that the question for them to decide was, whether the evidence shows only an extension of the time of delivery, or a giving up of the contract by mutual agreement, when said Shaw was ready and offering to fulfil it, and before the time had expired, and unless the contract was given up, the jury must find for the plaintiffs. It was for the defendants to make out that there was a valid and binding agreement for the cancellation of this contract. His evidence shows that a subordinate officer in the Navy Department intimated to the agent that this was feasible. But in this conversation, as well as in the subsequent correspondence, he declared that the head of the department must be consulted. In effect, the principal submitted two subjects for the consideration of the department, and asked for a reply. But the department retained the letter six months, and then demanded the fulfilment of the contract. There is nothing that can be drawn from these facts, except an acquiescence of the department in a delay for that period of time. It is the duty of the court to construe written instruments, and that principle is not affected by the fact that the instruments consist of written correspondence extending over a considerable length of time, or that it may embrace a great variety of circumstances. If a contract is to be sought in such a correspondence, or if the discharge of a right or obligation is to be deduced from it, the duty must be performed by the court, and not by the jury. *Bliven et al.*

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v. *New England Screw Co.*, 23 How. 420 ; *Begg v. Forbes*, 30 Eng. L. & Eq. 508 ; *Hutchins v. Baker*, 5 M. & W. 535. Decided cases undoubtedly may be found, in which it has been held, that where the effect of a written agreement collaterally introduced as evidence depends, not merely upon the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. It was so held by the Supreme Court in *Etting v. The Bank of United States*, 11 Whea. 75 ; and in *Barreda et al. v. Silsbee*, 21 How. 168. But the principle involved in those decisions has no application to the present case. As the decision of this question will probably be decisive of the case in another trial, I abstain from examining any other questions at the present time.

Judgment reversed.



THE BARK EDWIN, HENRY F. BUCKLEY, Claimant and Appellant,
v. THE NAUMKEAG STEAM COTTON COMPANY, Libellants.

When goods were placed on board a lighter in the employment of the master of a vessel, to be transported to the vessel, the delivery to the master was complete, and the liability of the vessel to which the goods were to be transported commenced.

Unaccompanied by any delivery of the goods, the contract of the master for their transportation creates no lien upon the vessel, and the contract cannot be enforced in the admiralty by a proceeding *in rem* against the vessel.

Pursuant to a contract of affreightment, part of a cargo of cotton was received at a wharf in Mobile, by the master of a ship lying below the bar, and was transported, in a lighter hired by him, several miles, to his vessel. While the lighter was alongside, her boiler burst, and the cotton, being still on board of the lighter, was destroyed. On this state of facts the court *held*, that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor on the ship. This decision is not inconsistent with *Buckingham v. Schooner Freeman*, 18 How. 188 ; or *Vandewater v. Mills*, 19 How. 90.

THIS was an appeal in admiralty from a decree of the District Court in a suit *in rem* brought by the appellees against the bark Edwin, on a contract of affreightment. At the hearing in the District Court, the case was submitted upon the following agreed statement of facts, in which the important question in the case is embodied : —

“ In December, 1858, the vessel was at Mobile ; the master, through a ship-broker, agreed to transport for the libellant 707

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bales of cotton to Boston for the freight stipulated in the bills of lading.

“Vessels drawing over a certain depth of water cannot pass the bar below Mobile, and vessels which can in ballast take on board at Mobile enough to load them so that they can pass the bar are then towed down below it. The residue of their cargo is then brought to them in steam lighters. Vessels drawing too much water to pass the bar are wholly loaded in this manner.

“In either case, when the vessel is ready to receive cargo, the master gives notice to his consignee, or the broker through whom his freight is engaged, that he is ready, and engages for the ship a steam lighter for the purpose, and pays therefor on account of the ship. The lighterman applies to the consignee of the ship, or broker, and receives an order for the amount of bales to be delivered to him from the cotton press. He receives it there to carry to the vessel, and gives his own receipt for it. On delivering the same on board of the vessel, he takes a receipt from the mate or some other officer in charge. The bills of lading are subsequently signed and delivered.

“The Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer F. M. Streck for this purpose, and on the 20th of December 100 bales were laden on board of her at the Cotton Press to be taken down, for which the master of the steamer gave a receipt. After she had arrived at the side of the Edwin, and before any part of the 100 bales was taken out, and receipted for, her boiler exploded, by which all the cotton was thrown into the water, and the boat sank. Fourteen bales were picked up by the crew of the Edwin, and brought to Boston with the balance of 607 bales mentioned in the bills of lading. Eighty were picked up by other parties, wet and damaged, and were surveyed and sold; four remain in the hands of the ship-broker at Mobile for account of whom it may concern, and two were lost.

“December 28th, the master signed bills of lading, including said 100 bales, being advised that he was bound to do so, and that if he refused his vessel would be arrested and detained.

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“On arrival in Boston, the master delivered 607 bales, and tendered fourteen, which the consignees refused to accept on account of their being damaged.

“It is customary in insurance on goods at and from Mobile, for the insurers to assume the risk of lighterage.

“If the court should deem it material whether the steamer employed was or was not fit and suitable for that purpose, either party may introduce evidence relating to it.”

In the District Court a decree was entered for the libellants.

F C. Loring, for claimant and appellant.

Milton Andros, for libellants.

CLIFFORD, J. It is insisted by the libellant that the liability of the vessel is commensurate with that of the owners, and that the extent of it in regard to both must be ascertained and measured by the terms of the contract made by the master. On the part of the respondent, it is insisted, that the ship is not bound to the merchandise, or the merchandise to the ship, until it is actually placed on board, and that the liability, both of the ship and the owners, notwithstanding the terms of the contract, must be narrowed to the service actually performed by the vessel. It must be admitted that the question is not free of difficulty, and perhaps is involved in some doubt. Much must depend in its solution upon the view taken of the authority of the master, and the real nature and character of the service performed. Something also will depend upon the circumstances attending the making of the contract, and the situation and acts of the parties at the time it was made, and when the loss occurred, as furnishing the key to unlock and unfold its real intent and meaning. Seafaring men are known to be well acquainted with the port of Mobile, and the usual and ordinary course of business in lading vessels in that harbor. Small vessels go up to the wharves to take in cargo; but large vessels cannot approach the wharves at all, on account of the shoalness of the water over the bar, but anchor below and have their cargoes brought down in lighters. Vessels of an intermediate size generally go up to the wharves, and take in what cargo they can safely carry over the bar, and return to the anchorage below, either by their own means of sailing or by means of

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tugs employed for that purpose, and have the residue of their cargoes brought down, as in the case of large vessels. Large quantities of cotton are annually exported from that port, and the masters and owners of vessels engaged in the trade are as well acquainted with the navigation and the course of business as at the larger commercial ports. Owners send freighting vessels to that port in ballast or otherwise, seeking employment for their vessels, and trust very largely to the discretion of the master to stipulate upon the terms and conditions for transporting the cotton to other domestic ports, or to the foreign market. Northern vessels are largely engaged in that trade, and find their employment to a considerable extent from the agents of the manufacturer of the raw material, or from the Northern merchant who has become the purchaser of the same, for the supply of the manufacturing establishments in the Northeastern States. Shipments are made through agents or brokers residing in the port of lading, who contract with the master of the vessel for the transportation of the cotton, and deliver the same to him in pursuance of the contract of shipment. When the contract is for the transportation of cotton in vessels requiring the cargo to be lightered, in whole or in part, the master employs the lighter in behalf of the vessel, and pays for such partial conveyance on account of the owners. Transportation coastwise to the Northern ports may be safely made in vessels of either of the classes before mentioned, so that the shipper or his agent has no motive or interest to inquire whether the cargo is to be lightered or taken on board at the wharves. He contracts as in this case that the cotton shall be transported for a given freight from the wharf or the cotton-press, as the case may be, to the place of destination. Different vessels of the same tonnage require a greater or less depth of water, according to their construction, and accordingly vessels of an intermediate size may or may not require the assistance of lighters, as they are well or ill constructed for that peculiar navigation. Whether they can or can not go up to the wharves and take in their whole cargo is well known to the master of the vessel, but may not be known to the shipper or his agent. Shippers are governed, in making such contracts, by the

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price to be paid for the transportation, and are only indirectly interested in the cost of lighterage, so far as it affects the price of freight. On the other hand, the master, as the agent of the owners, has the means of knowing the state of navigation, the construction of his vessel, and the cost of performing the service, and is bound to determine whether he can afford to accept the proffered terms for the transportation of the goods. Masters are the agents of the owners, and as such have an implied authority to bind them, even without their knowledge, by contracts relative to the usual employment of the ship. "Owners," says a learned commentator, "rarely navigate their own ship, but almost always intrust its conduct and management to the master. They hold him forth to the world as authorized to contract, and by reason of their employment of the ship, and the profit derived by them from that employment, they are bound to the performance of every lawful contract made by him relative to the usual employment of the vessel." Abb. on Ship. (ed. 1846), 156; 3 Kent's Com. (9th ed.) 220; Chitty on Car. (ed. 1857), 225; *The New World*, 16 How. 473; Sm. Mer. L. 559; *Grant v. Norway*, 10 Com. B. 688. Possession of the cotton in this case was to be taken by the master at the cotton-press. His contract was to carry a specified number of bales, and to transport the whole parcel from one given place to another. In the strictest sense, therefore, it was by its terms an entire contract for the conveyance of a given quantity of goods. *Sayward et al. v. Stevens*, 3 Gray, 97. Five sixths of the specified quantity had been taken from the cotton-press by the master, and was already on board the vessel. He employed the lighter in behalf of the vessel to bring down the remainder, and had agreed to pay for the service on account of the bark. Beyond question, it was a marine service which the lighter had engaged to perform, and she was in the employment of the master for the benefit of the vessel, and, in contemplation of law, was the agent of the owners in the performance of the service. Nothing can be more certain than that the service performed by the lighter was a marine service. She was required by the engagement to transport the cotton over navigable waters within the admiralty and maritime jurisdiction of the

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United States. Whether the water above the bar is more or less affected by the ebb and flow of the tide, it is nevertheless salt water, and is as much within the admiralty jurisdiction as the Gulf itself, or the open sea. Her employment in no sense whatever emanated from the shipper. By the terms of the contract between the master and the shipper, the former as much agreed to transport the cotton over the twenty or thirty miles of navigable water, lying between the wharf and the anchorage of the vessel below the bar, as over any other part of the route from there to the port of destination. Whatever, therefore, the lighter did, in forwarding the cotton on the route, was a part-performance of the contract made by the master with the shipper, for which the owners were to receive compensation in the freight earned by the vessel. Freight could not be earned by the vessel, unless the cotton was first transported over this part of the route embraced in the contract. As the vessel could not perform the service, some other agency was absolutely indispensable to enable the vessel to earn freight, and by the usage of the port it was entirely competent for the master to employ a lighter. Had it been practicable so to do, the master might have sent his own boats, as an appendage of the vessel, to bring down the cotton; or, if that course was impracticable, unsafe, or inconvenient, he might employ other usual and customary agencies, as an accessory to the vessel for the time being to accomplish the same result, so as to enable him to fulfil his contract, and enable the vessel to earn freight. His contract bound him to accept the cotton at the cotton-press, and when it was placed on board the lighter in his employment for the purpose of being transported to the bark, the delivery to him was complete, and the liability of the vessel commenced. When it was placed on board the lighter as a substitute for the bark, the shipper had fully parted with the possession, and, having no longer any control or right of control over it, was in no degree responsible for its safe custody. All the obligations of due transport, safe custody, and right delivery at the port of destination, which constitute the duties of the carrier, had then attached. Whenever those obligations of the carrier begin, they carry with them all the rights and priv-

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ileges incident and belonging to that relation. After such delivery by the shipper, the ship was bound to the merchandise and the merchandise to the ship, and the merchant could not recall the cargo or resume the possession without the payment of freight, unless by consent of the master. Contracts merely executory, where there has been no delivery of the goods to the master, or change of possession, stand upon a different ground. Unaccompanied by any delivery of the goods, the contract of the master for their transportation creates no lien upon the ship, and the contract cannot be enforced in the admiralty by a proceeding *in rem* against the vessel. Keeping in view this distinction, there will be no difficulty in reconciling all the decisions bearing upon this question. Take, for example, the case of *The Schooner Freeman v. Buckingham et al.*, 18 How. 188. In that case, the master had been fraudulently induced to sign bills of lading for certain merchandise, when none had been delivered, and when, in point of fact, the merchant had none such to be shipped, but had induced the master to sign them with intent to use them as instruments to obtain money from the libellant. He succeeded in his fraudulent purpose and obtained the advances. Failing to get back his money, the libellant instituted proceedings against the vessel. On that state of the case, the Supreme Court held that the vessel was not liable, and in enforcing the reasons for the conclusion, remarked that "the law creates no lien on a vessel, as the security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it"; but added in the same connection, that there was no cargo in that case, and no contract made for which the ship could stand as a security. Much reliance was also placed by the respondent upon the case of *Vandewater v. Mills*, 19 How. 90. It is insisted that the doctrine established by that case is, that the vessel and owners are never held liable on a contract for the transportation of goods, unless the goods are actually placed on board the vessel. Justice to the court requires that the facts of the case should be briefly noticed. As stated by the court, the libel set forth a contract between the owners of certain steamboats to convey freight and

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passengers between certain domestic ports. After the contract was executed, the owners of one of the steamers refused to employ their vessel according to the agreement, and sent her in another direction on a contract with other persons. For this breach of the contract, the libel was filed against the vessel, and the court held that the suit *in rem* could not be maintained. Among other things, the court remarked, that if the master or owner refused to perform his contract, or for any reason the ship does not receive cargo and depart on her voyage, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages as in other cases. No goods had been delivered in that case or offered for conveyance, and, of course, none had been injured or lost. Every remark in the opinion, as applied to the case then before the court, may well be reconciled with the view here taken of the present question. Damages were not claimed in that case for the failure to transport goods after their delivery to the master, or for their injury, deterioration, or loss in the voyage, but for the refusal of the owners to employ their vessel according to the contract; and in point of fact, the agreement had none of the features of a contract between the merchant and the carrier, for the transportation of merchandise. In this case, the contract is between the merchant and the master, as the agent of the owners. Due delivery of the cotton to the master undoubtedly was made, when the goods were placed on board the lighter which he had employed in behalf of the bark for the purpose of transporting it to the vessel. Mr. Parsons says, the reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, binds the ship to the safe carriage and delivery of the goods. 1 Parsons's Mar. Law, 132. Similar views are also expressed by Chancellor Kent. He says the responsibility of the owner begins where that of the wharfinger ends, and when the goods are delivered to some accredited person on board the ship. 3 Kent's Com. (9th ed.) 281. It was held by Lord Ellenborough, in *Cobban et al. v. Downe*, 5 Esp. 41, that

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where the usage is to deliver the goods on the wharf to the mate of the vessel by which they are to be carried, such a delivery has the effect to terminate the responsibility of the wharfinger, and, in delivering judgment, he proceeded upon the ground that the liability of the ship commenced where the responsibility of the wharfinger ended. Reference is also made by the respondent to the case of *Morewood et al. v. Pollok et al.*, 18 Eng. L. & Eq. 341, as asserting a different doctrine; but there is nothing in that case inconsistent with the rule, that the goods, when placed in the lighter in the employment of the respondent, and for the purpose of being transported to the vessel, were duly delivered to him pursuant to the contract. All the cases agree that, so soon as a sufficient delivery of the goods is made to an authorized person, for the purpose of transportation, in pursuance of a lawful contract, the vessel is liable. *Faulkner v. Wright*, 1 Rice, 107; *Greenwood v. Cooper*, 10 La. Ann. 796; *Clarke v. Needles*, 25 Penn. State R. 338; *Snow v. Carruth*, 19 Law Rep. 198, Chitty on Car. (ed. 1857), p. 228; Molloy, B. 2, c. 2, s. 2; *Hosea v. McCoy*, 12 Ala. 349; *Trowbridge v. Chapin*, 23 Conn. 595. That the owners of vessels are bound by the contract of the master when acting within the scope of his authority, is a proposition universally admitted. *The Paragon*, Ware, 326; *The Phæbe*, Ware, 265; *Hewett v. Buck*, 17 Me. 147. As a general rule, whenever the owners are liable, the ship is also liable; and to such an extent has the rule been carried in some of the cases, that it is said that the liability of the ship and the responsibility of the owners are convertible terms. *The Druid*, 1 W. Rob. 399. Exceptions undoubtedly exist to that rule, but none of them have any application to cases of this description.

After full consideration of the case, I am of the opinion, that the decision of the District Court was correct, and the decree there made is accordingly affirmed with costs.

WILLIAM POPE *et al.* v. THE STEAMBOAT R. B. FORBES, CHARLES PEARSON, Treasurer, Claimant and Appellant.

A vessel that has the wind free, or is sailing before or with the wind, must keep out of the way of a vessel that is close hauled, or sailing by or against the wind.

The vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences.

- Steamers are always under obligation to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances; and their obligation extends still further, because they have a power to avoid collision, not belonging to sailing vessels even with a free wind.

As a general rule, when a steamer meets a sailing vessel, whether the latter is close hauled or with the wind free, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid a collision.

It is the duty of the sailing vessel to keep her course; and if she fails to do it, and a collision ensues, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of course and the other circumstances of the case.

APPEAL from the District Court in a cause of collision. The libel was entered at a special District Court held on the 21st of October, 1856, and thence continued to the 25th of the same month, when, after a full hearing, a preliminary decree was pronounced in favor of libellants and an assessor appointed, whose report was made and filed March 27, 1857, and on the same day a final decree was entered against the steamboat for the sum so reported, and costs.

The suit was *in rem*, and the libel alleged that the schooner Eliza, on the 22d of May, 1856, on a voyage from Machias to Boston, in the evening, was beating up towards her port of destination, when the lights of the steamer were first discovered, about one mile distant, and coming from the direction of the city, and being, as nearly as could be judged, abreast the "Castle." At that time she was seen by the master, who was standing at the wheel; by the mate and one of the crew, who were upon the lookout, and in the forward part of the schooner. The steamer had a ship in tow, fastened to her side.

When the steamer was first discovered, the schooner was heading about northwest by west, and the wind blowing about north

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by east. The weather was overcast, and the schooner was sailing close hauled upon the wind, with her starboard tacks aboard, and going about five miles an hour. When the schooner was more than half a mile distant, the master called to the seaman on the lookout to come aft and get a light, and the seaman, taking the light then burning from the binnacle, carried it forward, and standing upon the forward part of the deck load, swung the light backward and forward in plain view of the approaching steamer. As the steamer further approached, the master and some of the crew shouted to the crew of the steamer to keep clear, which they then had time to do. The steamer kept on her course, and ran the vessel she had in tow into, and did serious damage to the schooner, in consequence of which she sank to the water's edge. The libel alleged that the schooner had all sails set except the gaff topsail, and kept steadily on her course from the time the steamer was first seen till the collision. The answer denied that the material facts of the collision were correctly stated in the libel.

The R. R. Forbes was hired by the ship Romance of the Seas to tow her from the port of Boston ; the steamer was not under the care or direction of her owners, but under that of the owners of the ship, her master, and a branch pilot, to whom at the time the management of both ship and steamer was committed. If the steamer, at the time of the collision, was not sailing in the proper direction, those who had control both of her and the ship should be responsible. Powerful lights were displayed from the ship and steamer, and the steamer's whistle was frequently sounded.

The answer, moreover, set up that the schooner, previous to the accident, was going about northwest, — the wind being about north by east, — and was sailing close hauled, and going about five miles an hour ; but that just before the accident, she suddenly tacked, and was at the time of the collision heading about north, across the bows of the ship.

C. F. Pike, for libellants.

When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision,

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and if this is not done, *prima facie* the steamer is chargeable with fault. *Oregon v. Rocca*, 18 How. 391; *The R. B. Forbes*, 19 Law Rep. 544.

When a sailing vessel is lashed to a steamer, and the sailing vessel is moved entirely by the power of the steamer, the latter is liable for the injury caused to another vessel in collision with the sailing vessel so lashed, in case of negligence. *Phila. and Read. R. R. v. Derby*, 14 How. 486; *Sprowl v. Hemmingway*, 14 Pick. 1; *Fletcher v. Braddick*, 5 B. & P. 182.

The fact (which is denied) that a pilot had command does not relieve the steamer from liability. *Rodrigues v. Melhuish*, 28 Eng. L. & Eq. 474; *Fletcher v. Braddick*, 5 B. & P. 182; *The Neptune*, 1 Dod. 467.

H. F. Durant, for claimant.

The rule that a steamer must, at her peril, keep out of the way of all sailing vessels, does not apply in a dark night, when the sailing vessel is invisible. In such case the only duty of the steamer is to use ordinary care and reasonable precaution to avoid a collision. *The Osprey*, 2 Wall. Jr. 268.

In this case the care was extraordinary, and every precaution that could be employed was used.

Four bright lights were forward, and fourteen hands were on the forecastle of the ship as lookouts, and four on the tug. The steam-whistle was constantly sounding, and the steamer and her tow were moving along only three miles an hour, instead of thirteen. If either vessel was responsible, it was the ship under the command of a duly licensed pilot. The steamer was not the author or the agent of the injury. *The Carolus*, 2 Cur. 69; *The Maria*, 1 W. Rob. 95; *The Agricola*, 2 W. Rob. 10.

The schooner's carelessness, as a matter of fact, caused the disaster. She had no permanent light, and she changed her course. The showing the binnacle light makes against her, since she was thus left ten or fifteen minutes without a compass to steer by.

CLIFFORD, J. Some of the circumstances and incidents of the disaster, as well as many of those immediately preceding it, are either admitted or so fully proved, that they cannot be regarded

as the subjects of dispute. It is certain that a collision took place between the schooner and the ship, and there is no reason to doubt that it occurred at the time and near the place set forth in the libel, probably about midway between the Long Island Light and the place where it is alleged that the steamer was when her lights were first discovered by the master, mate, and crew of the schooner. Damage was done to the schooner by the collision, and to such an extent that, within an hour after, she sank to the water's level. She was a topsail schooner of about one hundred and twenty tons, with a full, square, bluff bow, and was heavily laden with lumber. Unlike the schooner, the ship was sharp built, being, according to the testimony of the master, two hundred and forty-one feet long on her deck, and about sixty from the knight heads to the end of the flying jibboom, and measuring more than seventeen hundred tons. Her sails were furled, and the steamer was lashed to her starboard side, and fastened, forward and aft, to the bits of the ship by a line, so that the bows of the steamer reached only to the forerigging of the ship, and they were both moved by the steamer, which was the only motive-power. When the lights of the steamer were first discovered by the master and crew of the schooner, it is clearly proved that the steamer was about a mile distant, and nearly opposite "the castle," and it is equally well established that the schooner was then sailing close hauled upon the wind, with her starboard tacks aboard, heading probably about northwest by west, and going about five miles an hour. It is alleged in the libel, and admitted in the answer, that the wind was about north by east, and the weight of the evidence clearly shows that the schooner would lay within five or six points of the wind; and Thomas Milans, a seaman on board the schooner, testified that she was then sailing on the wind, about west-northwest, as near as she would lay. Enoch Wasgett testified that a square-rigged vessel will lay within about six points, and that this schooner would lay about as near as a square-rigged vessel. Mathew Hunt testified that a common coasting schooner will stand within five or five and a half points, and many of them will lay within five points. Henry Rose, Jr., was of the opinion that "a blunt,

full, flat vessel " would have to haul nearer to the wind, to make her course, than one of a sharp model. Thomas Rogers said, that some vessels would lay within five points of the wind, and some will not lay so near. The mate of the schooner testified that, at the time of the accident, the schooner was close hauled on the wind, as near as she would lay, *within about five points*, and that she could lay within five points. Both parties agree in the pleadings that the schooner was close hauled, and, as before remarked, that the wind was north by east; and the evidence clearly shows that it was not more eastward. Assuming that the wind was north by east, or north, and that the schooner was sailing up the harbor, close hauled, on the wind, her course must have been, according to the evidence, either northwest by west, or northwest; and whether it was the one or the other, cannot materially affect the merits of the case. In respect to the steamer, it appears, from the testimony of the master, that she was sailing down the harbor, on a course of east by south, or east half south, against the tide, and at the rate of three or four miles an hour, though the pilot, who was standing on the ship, says that some three minutes before the collision, he altered the course a little more to the eastward. How much alteration was made in the course at that time the witness does not state; but it must have been very inconsiderable, as the master of the steamer makes no mention of it at all, and, what is more, the mate, who was at the wheel all the time, testified, without any qualification whatever, that they were steering about east by south, and such it is believed was the course of the ship and steamer at the time the collision occurred; and so it is alleged in the answer; and there is nothing in the testimony of any other witness in the case that conflicts in the least with this conclusion, or that furnishes any countenance whatever to the supposition that any material change was made until the moment the collision took place.

Both sides refer to the condition of the schooner after the collision, and rely upon the particulars of the damage done to her, to support their respective theories as to the manner in which the ship and schooner came in contact; and here there is one important circumstance, which, according to the evidence in the

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case, is placed beyond the reach of doubt, and that is, that the ship first struck the bowsprit of the schooner on the larboard side. That fact is so fully proved, that no theory inconsistent with it can be sustained (unless it can be reconciled, in some way, with that hypothesis), as the fact is affirmed by several witnesses, and the marks still visible on that side of the bowsprit, tend strongly to verify their statements into absolute certainty.

Another circumstance in the same connection is satisfactorily established. Immediately after the collision, and almost at the same instant, the stern of the schooner swung round to the westward, which brought her alongside of the steamer. Douglas Fugan, one of the lookouts on the ship says, "She slewed mighty quick," and her stern came round towards the steamer; that when he first saw her, he thought he saw her bows; and the next he saw after, the collision, was her stern slewing round. The mate of the steamer says, "that her stern, after the collision, swung to the westward with the tide, and she came alongside, and the steamer hit her a thump, and broke off a piece of her stanchion, behind the forerigging." When the vessels came together, the larboard side of the bowsprit of the schooner was first struck, and at a point about two feet behind the cap, and the appearance of the indentation, occasioned by the collision, tends strongly to confirm the testimony of the witnesses for the libellants, that the course of the ship must have been at a very acute angle with the line of the bowsprit, as the indentation is deeper on the side next the cap than on the opposite side toward the stern, and it also affords support to the opinion, expressed by several witnesses, that it was a "glancing blow." Many of the particulars of the damage done to the schooner are also clearly shown, and in respect to some of them there does not appear to be any dispute. It is not questioned that the bowsprit was broken off and carried away, but the parties disagree as to the precise manner in which it was done. On the part of the respondents, it is insisted that the ship and schooner came together at nearly right angles, and that it was broken and carried away by the immediate collision. According to the theory of the libellants, the vessels came together nearly head on, and the ship

grazed along on the larboard side of the bowsprit, six or eight feet, towards the stern of the schooner, before it was broken off, leaving marks of black paint from the ship or rigging on the side of the bowsprit, and bending down the gasket staples and inclining them over towards the starboard bow of the schooner. Paint marks, such as might be expected from the cause assigned, are still to be seen on the bowsprit, and the gasket staples on its larboard side are bent down and inclined over in the manner described ; and if it be assumed that these *indicia* are the result of the collision, it must be admitted that they tend strongly to establish the libellant's view of the case.

On the merits, the respondents contend, in the first place, that the schooner was in fault, because they say that she changed her course more to the northward or luffed up into the wind before the collision, and at a time when, if she had kept her course, the collision would not have occurred, and that the effect of the change in her course was to bring her across the bows of the ship, so that the vessels came together nearly at right angles ; and if the facts are so, the legal consequences deduced from them by the respondents would clearly follow, as will plainly appear from the nautical rules recognized and approved by the Supreme Court. Those rules, so far as they are applicable to the different aspects of this case, are in substance as follows : A vessel that has the wind free, or sailing before or with the wind, must keep out of the way of the vessel that is close-hauled, or sailing by or against it ; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. And the same rule applies to cases where one of the vessels is propelled by steam, with, at least, this difference, that steam vessels are regarded in the light of sailing vessels navigating with a fair wind, and are always under obligation to do whatever a sailing vessel, going free or with a fair wind, would be required to do under similar circumstances ; and their obligation extends still further, because they possess a power to avoid collision not belonging to sailing vessels, even with a free wind, — the master having the steamer under his command, both by altering the helm and stopping

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the engines. As a general rule, therefore, when a steamer meets a sailing vessel, whether the latter is close-hauled or with a free wind, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her; and in general it is the duty of the sailing vessel to keep her course, that the steamer may know what measures to adopt in order to avoid the danger; and if the former fails to do this, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of the course and the other circumstances of the case. *St. John v. Paine et al.*, 10 How. 557. Apply the principles to the proposition maintained in behalf of the respondents, and it is clear, if the state of facts assumed as its basis is correct, then the libellants are not entitled to prevail in the suit. Facts, however, to justify or excuse the steamer cannot be presumed without proof. On the contrary, in the absence of proof showing fault on the part of the sailing vessel, the presumption, *prima facie*, is that the steamer is answerable; and so it has been ruled by the Supreme Court. *The Steamer Oregon v. Rocca et al.*, 18 How. 570. These views lead necessarily to the inquiry, whether the schooner did or did not change her course, or luff up into the wind, as is supposed by the respondents. Four witnesses, who were on board the schooner, testify in the most positive terms, that she did not. They say she kept her course, and made no change in it whatever, after the steamer was discovered. One of them is the master, who was at the wheel all the time after the steamer hove in view. He says, "She did not change her course"; and asserts, without any qualification, that it was the same course she had been on before the steamer was seen. Another is the mate, who was all the time forward, on the starboard side of the deck-load, except for one or two minutes, when he went on to the knight-heads. He says there was no change whatever, and does not think there was any attempt to make a change, and assigns as a reason for the opinion that, if there had been, they would have sung out to him forward to ease the jib-sheets; and when asked if he knew of his own knowledge that there was no attempt to luff or tack,

he answered positively that he knew there was not. Two of the crew also testify, with equal positiveness, that the schooner did not change her course, and one of them says, there was no change made in her sails, to the time of the collision, and, by the bearings of the steamer, she too kept her true course. Those four persons composed the whole of the schooner's company, except the cook, who was below, and had no means of knowledge upon the subject.

Numerous witnesses were introduced by the respondents, and some fourteen or fifteen were examined upon matters bearing directly or indirectly upon the point now under consideration. One observation, however, is applicable to them all, and that is, they had not the same means of knowledge as the witnesses called by the libellants, for the plain reason that they did not see the schooner in season or under circumstances to enable them to ascertain her actual course so well as those on board her, who laid the course and determined her movements; and in respect to several of the witnesses, it is to be observed that their impressions upon the subject are entitled to but little weight when opposed to the positive testimony upon the other side. Thomas Cook, one of the lookouts, when asked what first called his attention to the schooner, answered that it was the schooner herself; and he says he was looking out for vessels ahead, and this one loomed right up under the bows of the ship, whose lights shone down on her deck, and that half a dozen of the men saw her, all at once, and sang right out. He was standing on the starboard side of the top-gallant forecastle of the ship, not far from the cathead. John S. Hilton, another of the lookouts, says that Charles Smith discovered the sail first, and he sung out, "Sail ahead"; the pilot asked where, and he answered, on the starboard bow; the steamboat was then stopped and the wheels reversed. The master of the ship, who was standing, in company with the pilot, the master of the steamer, and his brother, on the ship's house, being asked how far the ship was from the schooner when he first saw her, answered, "that he did not see her until the ship was close aboard of her; she had not struck when he saw her." The master of the steamer, who was standing on the port side of the ship's

house, says she was very near the ship when he saw her ; that a man on the forecastle sang out, there was a vessel on the starboard bow, and that he went to midships, and then he saw her coming, heading round across the bows of the ship, and he thinks she was about a length off when he saw her, and says she was coming round in a circle, with her topsail flat aback, and was illuminated by the lights on the bows of the ship, and the men forward immediately sang out, " She is coming right into us " ; then he heard the pilot say to the man at the wheel, " Starboard the helm," and a few seconds after that they came together. The pilot, who was also standing on the ship's house near the mizzen-mast, when asked how far the steamer was off at the time he first saw her, answered, that he should think the distance was at that time about the length of the ship ; but said he could not judge accurately. Charles Smith, the lookout who first discovered the schooner, says when he first saw her she appeared to be coming right head on, and then he could only see her topsail ; and he says, when he sang out " Vessel on the lee bow," she appeared to come right up across the bows of the ship, and then he could see her other sails ; and he further says, there was plenty of room, as she was going when he first saw her, to pass by the ship, but she changed right up into the wind. He was lying down, and he says he lay so that he might not see the starboard light of the ship. The mate of the steamer, who was in the pilot-house, testified that when he first saw the schooner she was going across the bows of the ship a little distance off ; and, on cross-examination, when asked whether the schooner did not appear very suddenly to his sight, he said that she did ; that when she shot up into the wind, she appeared all at once, and that was the first he saw of her. Many other witnesses were introduced by the respondents, who state in substance and effect, that they first saw the schooner across the bows of the ship, and several profess to think that she was going in stays, and in fact express the opinion that she must have changed her course.

All the evidence must be considered together, in order to de-

termine which is the true theory as to the manner in which the ship and steamer came in contact; and in this connection, the fact that the ship struck the starboard side of the bowsprit of the schooner cannot be overlooked, as that fact is established by the concurrent testimony of nearly all the witnesses on both sides; and there does not appear to be any doubt that the marks pointed out and still to be seen on that side of the bowsprit were made at that time; and if so, it would seem that they must have been made by the ship or rigging grazing along on that side several feet before the bowsprit was broken off, and the same remark applies to the peculiar slope of the gasket staples, and this view is also fortified by the appearance of the stern of the schooner, which it is proved was perfectly sound six or eight hours before; and it receives additional confirmation in the fact, which must be admitted, that it was the ship and not the steamer which struck against the starboard bow of the schooner, as it was her larboard side that came in contact with the steamer, when her stern swung round to the westward.

These circumstantial facts all point in the same direction, and indicate very strongly that the witnesses for the libellants are correct when they say that the ship and schooner came together nearly head on.

Assuming this to be the real character of the disaster, then the testimony of all the witnesses on both sides may be reconciled consistently with their integrity; and it is the only basis by which it can be done, as the testimony of those called for the libellants is positive and relates either to their own acts or those within their actual knowledge, and consequently their statements must be true or else the witnesses are false; whereas those called by the respondents, not having seen the schooner until the two vessels were in such close proximity that the danger was imminent, and perhaps a collision inevitable, and then only imperfectly and but for a moment, they may have mistaken, in the surprise and confusion of the occurrence, what was occasioned by the motion and impetus of the ship, or the pressure of her jib-boom upon the spars or rigging of the schooner, for a change of course on the part of the schooner, really supposing, on account of the

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great length of the ship, that the distance between the two vessels was much greater than it actually was; and the testimony of the master of the steamer, when he says that the schooner appeared to be coming round in a circle, and that of another witness, who says she came round "mighty quick," favors this view of the case. Such must have been the opinion of the District judge, when he said: "The sudden and near approach of the schooner, as testified to by the witnesses for the defence, still further confirms the belief that she was not seen until the projecting jib-boom of the ship had begun to press her round, and give her the appearance of going in stays under the ship's bow"; and that view of the evidence introduced on the part of the respondents is believed to be just and reasonable. It is also insisted that the schooner was in fault because she did not seasonably show a light, and that the one ultimately shown, as matter of fact, was not taken from the binnacle until a collision was inevitable, and when exhibited was feeble and insufficient. Such is understood to be the substance of the defence under this head, as it was presented at the argument. It involves two questions of fact and a question of law of considerable practical importance. Whether the maritime usage of this country absolutely requires merchant vessels to carry a light in the night-time has not been distinctly ruled by the Supreme Court. That question came up incidentally in the Third Circuit, in the case of *The Osprey*, 2 Wall. Jr. 268, and it was there held to the effect that, where a collision occurs between two vessels in the night-time, one having suitable lights and the other having none, it is no more than reasonable, in the absence of any special circumstances affecting the merits of the case, to treat the vessel without lights as the wrongdoer, and liable to make reparation, while at the same time it was admitted that there is no imperative rule upon the subject requiring vessels to carry lights under those circumstances, and that courts of justice have no authority to prescribe a rule and make it binding upon such vessels.

A case not very dissimilar in principle was afterward presented to the Supreme Court, where the same doctrine is substantially laid down in respect to the removal of a light after it had been

shown. According to the statement of facts in that case, the night was dark and rainy, and the wind was blowing fresh. A proper light had been hung in the fore-rigging early in the evening, and kept there till near the time of the collision, which happened about half past eleven o'clock. One of the hands had taken the lamp down to wipe off the water that had collected upon the glass globe, so that it might shine brighter. While he was standing midships wiping the lamp, he heard the approach of the steamer, and immediately placed it on the top of the cook-house, and the collision soon after occurred. On that state of facts the court said: "The fault lies in removing the lamp for a moment from the fore-rigging to midships. If it was not practicable to wipe it in the fore-rigging, another light should have been placed there on its removal. The time of the removal may be, as happened in this case, the instant when the presence of the light was most needed to give warning to the vessel approaching. All the hands examined who were on board the steamer deny that they saw any light at the time on the schooner. We agree, therefore, with the court below, that the schooner was in fault." *Rogers et al. v. Steamer St. Charles*, 19 How. 108.

In *Williams v. Hill et al.*, 19 How. 241, it was held that neither rain, nor the darkness of the night, nor the absence of a light from a sailing vessel, nor the fact that a steamer is well manned and furnished and conducted with caution, will excuse a steamer for coming in collision with a sailing vessel navigating in a thoroughfare out of the usual track of the steam vessel; and the court say that the ruling principle is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions; and add, in effect, that the question, whether the omission of any precautionary measure can or cannot be excused, must depend upon all the circumstances of the case.

The result of the cases seems to be, that while there is no positive rule of law requiring sailing vessels navigating in the nighttime to show a light, yet it is no more than a proper precautionary measure on their part, especially in a dark night, and in harbors or other thoroughfares where they are constantly liable to

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meet steamers or other sailing vessels ; and if a sailing vessel thus navigating in a dark night omits that precaution, and a collision occurs doing damage to the dark vessel, and it appears that the want of a proper light on her part occasioned or contributed to the accident, the vessel which showed a proper light, whether steamer or sailing vessel, is not liable ; provided it also appears that she is not otherwise in fault, and used all reasonable exertions to prevent the collision.

It becomes important, therefore, to ascertain more particularly the character of the night, and whether a proper light was seasonably shown by the schooner. The master of the steamer, testified that the night was cloudy with stars out ; that there was no moon, and that it was a good night to see lights any distance ; and when asked whether he knew of anything which could prevent a lookout on the forecastle from observing a schooner with a light up a mile off, he answered that he did not, and added, that there was no trouble that night to see a light one, two, or three miles. The master of the schooner, testified that the weather was overcast, a star to be seen here and there ; and when asked how far the light on board the schooner could be seen, replied, that it could be seen a mile distant. The master of the ship, testified that it was clear, with clouds at intervals, and rather hazy on the water. The mate of the schooner, testified that it was a night when a light could be seen a great way, and that there were some stars out ; and expressed the opinion that it could be seen a mile and a half or two miles as clear as it was that night.

Several other witnesses were examined to the same point, and discrepancies are observable in their testimony ; but having come to the conclusion that those already referred to have given the true character of the night as nearly as it can be described, it is unnecessary to recapitulate the other evidence. Not a doubt is entertained that both the ship and steamer had experienced lookouts. John S. Hilton testified that he was on the top-gallant forecastle of the ship on the lookout, and that there were fourteen or fifteen others, all looking out ; and the master of the steamer says that twelve or fourteen men were put there and told to look

out ; and he further says that the pilot and himself were keeping a lookout, and that the lights over the bows of the ship were not visible on the cabin or poop deck where they stood. The schooner also had good lookouts, who saw the lights of the ship and steamer when a mile distant ; and the master of the schooner testified that when the steamer was about a half-mile distant, he took the light out of the binnacle, and had it carried forward by one of the crew, and ordered him to swing it backward and forward, so that the steamer, and of course those on board the ship, might know that the schooner was underweigh and was not at anchor, and it appears, according to his testimony, that the seaman immediately took the light, ran forward, and standing on the forward part of the deck-load, on the starboard side, nearly abreast of the foremast, held the light up as high as he could reach, and moved it backward and forward for several minutes ; the seaman who held the light, the mate, and another of the crew shouting for them to keep off ; and when the ship approached so near that she appeared to be coming right on to the schooner, the master says he ordered the seaman to take the light to the leeward, in order that the steamer might see it instead of the ship, as she had the moving power, and the order was obeyed. This statement of the master, in every essential particular, is fully confirmed by the mate and the two seamen, who were on the forward part of the schooner ; and the mate says as soon as those on board the ship and steamer could hear him, he went forward on to the knight-heads, and, when they were about a quarter of a mile distant, commenced to shout to them to keep off, and he, the master, and seaman each called to them three or four times, and continued shouting till the vessels struck. In respect to the character of the light shown by the schooner, the proof is equally full and plenary, that it was a bright light, and such as might be seen on that night at the distance of a mile.

It is no satisfactory answer to the evidence introduced on this point by the libellants, to say that the witnesses called by the respondents have testified that they did not see the light on the schooner till the moment of collision. Such testimony, under the circumstances of this case, only affects the credibility of the

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witnesses called by the libellants, and cannot avail, for the reasons already given, as well as for others which will presently be stated. Lookouts in sufficient number were placed in the forward part of the ship, where they ought to be, for the reason, among others which might be given, that the forward view of persons situated near the wheel is liable to be obstructed by the spars and rigging of the vessel. And the same reason requires that those forward should be so located that they can see ahead and on the respective sides of the vessel to which they are assigned, without any obstruction whatever, either from the lights or any other natural objects connected with the vessel. According to the testimony of the respondents, the ship had two lights, consisting of two large lanterns, one for each bow, and they were hung to the jib-guys, just forward of the sprit-sail yard, and the weight of the evidence clearly shows that, where the lookouts were standing, the lights were directly on the line of view ahead. Some of them say they found it necessary to get down on their knees; and one says he had to lie down to avoid that difficulty. Three lookouts were also stationed on the steamer, two forward and one in the wheel-house, who were men accustomed to that duty, and doubtless performed it as well as they could, in the situation in which they were placed, — the bows of the ship being sixty or eighty feet ahead of the bows of the steamer, and their vision, at least in one direction, seriously obstructed by the light on the starboard guy of the ship to which the steamer was lashed. Blind lookouts cannot fulfil the requirements of law, nor can those who are stationed behind obstructions so that they cannot see, as was substantially the fact with those on board the ship and steamer just before the collision occurred. Lookouts are required for a valuable purpose, and when they are so situated that they cannot accomplish the duty they are expected and required to perform, the case stands as it would if none had been employed; and if there be none such, additional to the helmsman, or if they are not stationed in a proper place or not actually and vigilantly employed in their duty, the Supreme Court has determined in a case where the omission was on the part of the steamer that it must be regarded as *prima facie* evidence that the collision was

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the fault of the steamboat, and that principle is applicable to the present case. *Propeller Genesee Chief*, 12 How. 463; *The Schooner Catherine*, 17 How. 177.

It is therefore the opinion of the court that a proper light was seasonably shown by the schooner, and that it was not her fault, or the fault of her master or crew; that it was not seen in time to prevent the collision; and consequently it is not a case where both parties are in fault; and it is equally clear, from all the evidence in the case, that the collision was not the result of inevitable accident.

Steamers are required to exercise the necessary precautions to avoid a collision; and that rule when applied to the facts of this case, as they are found to be, necessarily leads to the conclusion that the libellants are entitled to prevail in the suit, unless the proposition assumed by the respondents, that the ship alone is responsible, can be sustained.

They contend that the ship was wholly under the control of her own master and pilot at the time of the collision, and that the steamer did not, either as principal or agent, cause the damage done to the schooner, and could not have prevented it, and therefore is not liable in this suit; and they also contend that the ship is not liable, because she was under the sole charge and direction of a pilot, duly licensed to act in that capacity by the authorities of the State. Whether or not the ship is liable it is not necessary to consider, as she is not made a party to the suit, and the proposition, so far as it respects the steamer, presents an inquiry of fact, which must depend upon the evidence. It has already appeared that the steamer and ship were made fast together, and that the steamer had the only motive-power. Independently of the steamer, the ship with all her sails furled would have been unmanageable, and incapable of being governed or directed. Her lights were placed by the order of the pilot and the master of the steamer; and the mate of the steamer says that he was in the pilot-house of the steamer steering, and paying attention to orders from her master and pilot; and at the time of the collision he says he had ordered the engine to be reversed, and had put the helm to starboard, before the order was given

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by the pilot; and the master of the steamer says that he was about to give the order to stop and reverse, and went to the star-board side of the ship for that purpose, but found that it had already been done. On this state of facts, the conclusion must follow that the pilot was under a mistake when he expressed the opinion that the steamer was under his orders. It is clearly shown that it was not so at the time the collision occurred. The mere fact that a pilot was on board assisting in the management of the vessel, and occasionally giving orders, cannot defeat a recovery under the circumstances of this case. *Rodrigues v. Melhuish*, 28 Eng. L. & Eq. 474; *Smith et al. v. Condry*, 1. How. 28; *Bean v. The Schooner Monyuka*, 2 Cur. 72; *Fletcher v. Braddick*, 5 B. & P. 182; *The Neptune*, 1 Dod. 467.

I am of opinion, therefore, that the schooner did not change her course after the lights of the approaching vessels were first seen by her master and crew; that she did seasonably show a proper light, and that she was not in fault; but that there was fault on the part of those in charge of the other vessels in this, that the lights were so placed on the ship that they obstructed the vision of the lookouts; and also that the steamer, as the sole motive-power, failed to observe the rule of navigation, which requires steamers meeting sailing vessels to exercise the necessary precautions to avoid a collision, and consequently that she is liable in this case.

The decree, therefore, of the District Court is affirmed with costs.

CHARLES GOODYEAR *et als.* in Equity, v. THE BEVERLY RUBBER COMPANY.

The patent issued to Charles Goodyear, June 15, 1844, for improvement in india-rubber fabrics, reissued December 25, 1849, and extended for seven years, June 15, 1858, was for the product known as vulcanized rubber, as well as for the process by which it was produced.

When the patentee sells the right to make, use, and vend the invention in a particular place, the purchaser buys a portion of the franchise which the patent confers; but the purchase of a patented implement or machine for use in the ordinary pursuits of life stands on a different ground.

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By virtue of the contract of sale and the unconditional delivery of a patented article, it passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights.

When the patentee of certain processes and the product thereof, for a valuable consideration, sold the patented article, both the manufactured article and the materials of which it was composed passed to the purchaser, discharged of the peculiar privileges secured by the patent; and the purchaser may use the material in the manufacture of other articles not themselves protected by a patent.

And this is the case, although the patented article was bought of the patentee's licensee, who was restricted by the license to a use of the patented product different from that to which it was devoted by the purchaser.

BILL in equity to recover damages for the infringement of a patent right. Charles Goodyear was the inventor and patentee of an improved process for the manufacture of india-rubber, and the other complainants were grantees and licensees under him, of the exclusive right of making, using, and vending to others to be used, the said improvement for making clothing. Letters-patent were granted to the first-named complainant on the 13th of June, 1844, for a new and useful improvement in rubber fabrics. On the 25th of December, 1849, a reissue was granted him for fourteen years, and on the 15th of June, 1854, a renewal for seven years. The rights of the licensees to make various articles of rubber, and the exclusive right to make clothing under the patent, existed before the extension; and the same were continued to them by subsequent agreements, which were in force at the time of the suit. Articles manufactured from the material prepared according to the patented process were denominated vulcanized rubber goods, and it was alleged that the term applied to the goods was understood by the respondents, and all persons engaged in the business, to mean the goods made of a compound of india-rubber, in the original composition of which sulphur is present in any form or degree, and where the compound in that state has been subjected to the action of artificial heat, so as to produce the chemical or other changes described in their patents. To show the character of the infringement, it was further alleged that the respondents, in making their goods, had used a compound which at some time before the manufacture had been subjected to a treatment substantially similar to that of the complainants, and the same in its effects. The above embraces the substance

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of the bill, which prayed for an account, damages, and an injunction.

In effect the answer denied that the papers annexed to the bill of complaint were, as they purported to be, true copies of Charles Goodyear's original and reissued patents, or that the reissued patent was ever extended as alleged. Objection was also made to the maintenance of the suit by the last-named complainants, as they were not a legally existing corporation; and they were required to prove the existence of the agreements under which they claimed rights in the patent. Concerning the process it was admitted that the term "vulcanized rubber" was known and used as meaning india-rubber, manufactured according to the patent of Charles Goodyear, by subjecting it to a high degree of heat after it has been combined with certain metallic substances; but it was denied that all rubber goods which have sulphur in them, or have been subjected to any degree of heat, are vulcanized rubber. It was insisted that vulcanized rubber could be devulcanized and thus cease to be vulcanized, as iron can be changed to steel, and steel converted back into iron, and cease to be steel. The respondents claimed to manufacture the rubber for the manufacture of rubber goods by a different process from that of the complainants, and described their own method substantially as follows: They bought up the old worn-out shoes made by the first-named complainant and his assignees, and deprived them of those peculiar properties which constitute vulcanized rubber. To accomplish this, they ground up the shoes until they were reduced to a finely pulverized substance, and boiled it in hot water or steamed it for about forty-eight hours, to devulcanize the goods, destroy the sulphur and other metallic substances, and as far as possible expel them from the material. After the boiling process the substance became sticky and soft, so that it could be formed into a sheet or rolled out, like vulcanized rubber; but all the properties of vulcanized rubber were removed by this treatment. Resins, coal-tar, and gum-shellac were then incorporated with the material to give strength and perfection to the fabric; after which, spread upon cloth and made into the various intended articles, it was dried in the sun

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or in slightly heated rooms. For this process the respondents, as assignees of Hiram L. Hall, had three patents. The answer further set up as a proof that goods manufactured by the respondent's process were not vulcanized rubber goods; that they were not prevented from liability to decompose by the action of the essential oils, or from animal perspiration.

As a further defence, the answer set forth that all the rubber used by respondents had once been vulcanized by the license and permission of the first-named complainant, had once been publicly sold by his consent; and that therefore he had once been paid a price satisfactory to him, and that he could not therefore forbid or prevent the use of it by lawful purchasers for a lawful purpose.

B. R. Curtis and *E. Merwin*, for complainants.

It was shown by the evidence that the goods of the respondents retain more or less of the important qualities of vulcanized rubber, and that their value is due to that.

But assuming that the effect of their process is to devulcanize vulcanized india-rubber, and that their goods are no longer vulcanized, then the respondents are still liable, inasmuch as they unlawfully employ in their manufacture vulcanized rubber, the product of Goodyear, and secured to him by his patent.

Vulcanized rubber being covered by Goodyear's patent, no one can use it without his license. No express license is pretended. Then, if respondents have any implied license, they must derive it from the persons from whom they procured the rubber. But if the licensees from whom respondents obtained their rubber had no authority to employ the same in the manufacture of clothing, then respondents had no such right. Now the licensees of Goodyear are allowed to use vulcanized rubber for the manufacture of shoes only, and, not being allowed to use the rubber for any other purpose themselves, can confer no other right upon any one else.

Goodyear never directly granted a general use of his vulcanized rubber, and nothing passed by implication, except such things as were incident to the subject of the grant and necessary to its enjoyment. Broome, Leg. Max. (3d ed.) 310; *Stevens v. Gladding*, 17 How. 447 - 452, 453. See *Wilson v. Simpson*, 9 How. 109.

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The tariff which Goodyear received on the rubber shoes was adjusted in reference to the use of his product in the manufacture of that article, and he has been paid for nothing more.

Caleb Cushing and *H. F. Durant*, for respondents.

The substance of the defence is sufficiently indicated in the statement of the facts and pleadings.

CLIFFORD, J. Mere formal objections to the right of the complainants to maintain the suit will not be considered at the present time, for the reason that all those objections, even if well taken, may be obviated by additional proofs; and if it should appear that the complainants have a meritorious cause of action upon the merits, it would still be competent for the court to allow such proofs to be introduced. Two principal questions are presented on the merits, but in the view taken of the case it will only be necessary to examine one of them to determine the controversy. Assuming that the suit is well brought, and that the patent of the first-named complainant is for the product, as well as for the process of manufacturing it, still the respondents insist that they do not infringe the rights of the complainants; because, as they contend, they do not use that process in the manufacture of their goods, and inasmuch as they purchase the product in the market either from the patentee or his licensees, or those rightfully owning and possessing it under them, they have the right to use it as they please for any lawful purpose. In the second place, they insist that the process used by them has the effect to devulcanize the material which they use in the manufacture of their goods, depriving it of all the peculiar qualities and properties imparted to it by the process of the first-named complainant, and that the goods which they manufacture and sell are not vulcanized india-rubber goods, within the intent and meaning of the complainant's patent. By the pleadings and evidence it conclusively appears, that the respondents purchase the old worn-out shoes made and sold in the market by the first-named complainant, or his assignees, and use that material for the manufacture of their goods. Their process of preparing and using the material is stated by several witnesses of great experience and intelligence substantially as follows. They purchase the shoes made of vul-

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canized india-rubber, according to the process of the first-named complainant, grind it between steam-heated rollers into a coarse powder, then put the powder into what are called reclaimers, exposing it to a high degree of steam, say from seventy to one hundred and fifty pounds' pressure to the inch. When the mixture comes from the reclaimers it is pasty and tenacious, and is then passed through steam-heated rollers, adding coal-tar, litharge, and resin with lampblack during the process of rolling. Those substances are incorporated with the material while the steamed rubber is passing the rollers, which effects a combination of the whole, and produces, as the witnesses say, a thick pasty sheet of modified rubber, fit and prepared to be laid on cloth. That sheet of modified rubber is then put into the callenders, where the cloth is passing over a steam-heated roller, thereby receiving a thin coating or sheet of the composition, which is pressed on smooth by the roller of the calender. To complete the process, the cloth is then dried in the sun, or in rooms heated to a low degree of heat, as stated in the answer. Without entering more into particulars, it will be sufficient to say that the evidence, in the judgment of this court, shows conclusively that the respondents do not use the process of the complainants. They do not use sulphur or its equivalent in any form, and their process of drying the goods is essentially different, and is accomplished by a much lower degree of heat. That proposition is sustained as well by the results attained by the process as by the means employed to produce those results. Complainant's process is designed and has the effect to bring the composition or material to the state in which it was when the shoes were made and sold in the market. Respondents purchase the material in that state, and their process is designed and has the effect to destroy the foreign material connected with the rubber, such as cotton or wool, and to partially melt and very much to soften the rubber as manufactured by the complainants, thereby modifying and changing its state, at least temporarily, so that it can be again used for a similar purpose. These considerations lead necessarily to the conclusion that the respondents do not use the process of the complainants; but the whole evidence shows that they do use

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the product produced by the process, and in point of fact that they cannot use any other. No doubt is entertained that the patent of the first-named complainant is for the product as well as for the process by which it is manufactured. Of itself the patent is sufficient *prima facie* evidence that the patentee was the original and first inventor of the thing patented, and that the same was new and useful; from which it follows that the burden of proof lies on the respondents to show a prior invention, or to disprove its novelty and usefulness. They have not exhibited any such proof, and consequently cannot prevail on that ground. Assuming that their process does not produce a new product, they are therefore without defence in this suit; unless, under the circumstances of the case, they have a right to use the product manufactured by the complainants. That question is one of considerable importance, and certainly is not unattended with difficulty in its solution. Inventors, as in this case, have not only the exclusive right to manufacture the product according to their process, but they also have the exclusive right to use and sell the manufactured article. Those privileges constitute the rights secured to them by their letters-patent. Another person consequently cannot make vulcanized india-rubber for the purpose of manufacturing shoes and selling the manufactured article without the grant or license of the patentee or his assigns. Patentees may grant an interest in the patent, or they may license another to manufacture the product produced by their process, and authorize him to sell the same in the market. Whether the inventor in any given case has a patent for the article manufactured, or only for the product or the material of which it is composed, the unconditional sale of the manufactured article carries with it the absolute dominion over the material as well as over the manufactured article. Having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters-patent; and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, dis-

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charged of all the rights of the patentee previously attached to it, or impressed upon it, by the act of Congress under which the patent was granted. Few decided cases are to be found bearing on this question, and none perhaps where it has been directly determined. Those which come nearest to the point in the Federal courts are *Bloomer v. McQuewan et al.*, 14 How. 549; and *Wilson v. Rosseau et al.*, 4 How. 646, which very clearly and satisfactorily recognize the true distinction between the grant of the right to make and vend a patented machine, and the grant of the right to use it. In the case first named, Taney, Ch. J., says the franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented without the permission of the patentee, adding in effect that this right of excluding others from exercising those privileges is all he obtains by the patent. When the patentee sells the exclusive privilege of making and vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly which is derived from, and exercised under, the protection of the United States. Unless otherwise provided in the contract, the interest which the purchaser thus acquires terminates at the time limited for the continuance of the patent; and if holding merely as an assignee, he has no just claim to share in a further monopoly subsequently acquired by the patentee. But the purchaser of the machine or implement, for the purpose of using it in the ordinary pursuits of life, stands on a different ground. In using it he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. Whether the inventor had a patent or not, he might lawfully sell it to him, if no other patentee stood in the way. Accordingly, it has been repeatedly held by the Supreme Court, that a party who had purchased a patented machine, and was in the use of it during the original term of the patent, might continue to use the machine during the extended term. *Bloomer v. McQuewan et al.*, 14 How. 549; *Wilson v. Rosseau*, 4 How. 646. That rule, as was held in *Chaffee v. The Boston Belting Company*, decided at the last term of the Supreme Court, rests

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upon the doctrine as stated in the preceding case, that the purchaser, in using the machine under such circumstances, exercises no rights created by the Patent Act, nor does he derive title to it by virtue of the franchise or exclusive privileges granted to the patentee. Both of those cases affirm the rule, that when the patented machine rightfully passes to the hands of the purchaser, from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. By virtue of the contract of sale, and the unconditional delivery of the manufactured article, it passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. Whenever a valid sale of the patented article is thus made, it then becomes the private property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated. From this rule, which is believed to be a sound one, it follows that, if a purchaser acquires an absolute, unconditional title to that which is the subject of a patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with any other kind of property. Suppose it to be an implement or machine, he may devise it or sell it, and if it be composed of various parts he may break it up and use the materials for any other lawful purpose. Second purchasers acquire the same rights as the seller had, and may do with the article or its materials whatever the first purchaser could have lawfully done if he had not parted with the title. Some attempt was made at the argument to distinguish this case, and take it out of the operation of this general rule, on the ground that the patentee had never granted to any one the right to use his process to manufacture the patented product and sell it in the market, without restricting and specifying the object to which it was to be applied. To one he granted the right to use the process for the purpose of making shoes, and to another the exclusive right to use it for the purpose of making clothing. Neither had the right to use the process for the purpose granted to the other; and the argument proceeds upon the ground that the purchaser of the manufactured article in either

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case cannot apply the material of which the manufactured article is composed to any object or purpose other than the one to which the manufacturer and original seller was authorized to apply it. Beyond question the grantee, assignee, or licensee of the right to make and vend the patented product is bound by his contract and cannot exceed it. His contract, however, in the case under consideration, fully authorized him to manufacture the material of which the shoes are composed, and to sell the shoes in the market. When he sold the shoes and received the consideration for the sale, the royalty for that quantity of the manufactured product was paid, and so much of the product went to the purchaser discharged of the peculiar privileges secured by the patent. Absolute dominion over the material of which the shoes are manufactured passes to the purchaser when the sale is made, and he is not obliged to keep them as waste articles, or throw them away when they cease to be of value as shoes, but may use the material for any other lawful purpose to which it can be applied. As *bona fide* purchasers of the shoes, therefore, the respondents may use the material of which they are composed to make clothing or any other article not itself protected by a patent. Having come to this conclusion, it is unnecessary to consider the remaining proposition assumed by the respondents. The bill of complaint is therefore dismissed with costs.

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GEORGE HART, Appellant and Respondent, v. THOMAS SHAW,
Libellant.

In its nature the contract for conveyance of merchandise for a round sum is an entire contract, and unless it be completely performed by the delivery of all the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended in the partial performance; but if the owner of the cargo is the cause of its not being transported to the port of destination, full freight may be recovered.

Whenever the language of a contract is ambiguous, the intention of the parties is the primary rule of construction; and in order to understand the sense in which language was employed, it is necessary to examine attending circumstances, and weigh terms in connection with the subject-matter to which they were applied.

In this case, a guaranty of eight feet of water "at the place of loading" was construed to mean eight feet, or at least a sufficient depth to enable the vessel to perform her voyage at the place of loading and thence to the open sea.

THIS was an admiralty appeal. The libellant, master of the schooner B. F. Reeves, chartered her to respondent, to bring a quantity of cedar spars from Thoroughfare Island, in North River, N. C., for the round sum of one thousand dollars as freight; the cargo to be delivered by respondent within reach of the vessel's tackles, by whom also eight feet of water at the place of loading was guaranteed.

It appeared that the place of loading was somewhat more than one hundred miles from the open sea, and while the water was more than eight feet deep at the place of loading, the vessel in proceeding to the sea would have to pass through Hatteras Inlet, and over a bar at the mouth of the river, on which were only seven feet of water.

When two thirds of the cargo was taken on board, at the place of loading, it was found the vessel drew seven feet, and the libellant and the agent of the respondent agreed in the opinion that she could not safely undertake to carry any more through the inlet or over the bar. The remainder of the spars were thereupon formed into a raft, and the libellant gave bills of lading, stating the number of spars under and on deck and in the raft, which was to be towed through Hatteras Inlet and there taken on deck, and undertaking to deliver the whole to respondents, "dangers of the seas excepted." After passing the bar at the mouth of

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North River, the vessel encountered a sharp chopping sea, and the raft was broken up and lost, with the exception of a few spars picked up by the crew.

The vessel proceeded on her voyage and delivered all the spars taken on board, and the libel was brought to recover the entire sum agreed upon as freight. The decree of the District Court was for the whole sum stipulated in the charter.

From this decree the respondent appealed.

John C. Dodge, for libellant.

The undertaking of the libellant was necessarily dependent upon the respondent's guaranty. The parties surely did not intend that the vessel should be placed in a hole twenty miles from deep water and loaded there, whence she could never come with her load.

Libellant had the right to come home with what spars he could bring, and is entitled to his full charter-money. *Clark v. Crabtree*, 2 Cur. 87; *Giles v. Brig Cynthia*, 1 Pet. Adm. R. 203; *Kleine v. Catara*, 2 Gall. 60.

The spars were lost by perils of the sea. *Bullard v. Roger Williams Ins. Co.*, 1 Cur. 148.

F. C. Loring, for appellant.

The only stipulation the parties deemed it necessary to make was, that the water was eight feet in depth at the place of loading.

The charter-party required that the spars should be brought all the way on board the vessel.

The burden of proof is on the libellant to show that the spars were lost by the dangers of the seas. Story on Bailm. sec. 529; Ang. on Car. sec. 61.

Performance of an entire service was by the terms of the contract a condition precedent to the earning of freight. 3 Kent's Com. 296; *Cook v. Jennings*, 7 T. R. 381; *Clarke v. Gurnell*, 1 Bulst. 167; *Barker v. Cheriot*, 2 Johns. 352; *Scott v. Libby*, 2 Johns. 336; *Pennoyer v. Hallett*, 15 Johns. 332; *Towle v. Kettell*, 5 Cush. 18.

CLIFFORD, J. It is not controverted that the libellant, when the vessel reached the island mentioned in the charter-party, gave notice of her arrival to Heman S. Hinds, as therein stipu-

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lated to be done, and proceeded to take in the spars furnished by him. He was the correspondent of the charterer, and beyond question was his agent to furnish the spars and deliver them to the master of the vessel. To that extent he is clearly recognized as the agent of the respondent by the terms of the charter-party. Cargo was to be furnished as fast as the vessel could take it, and in case of default in that behalf, either on the part of the charterer or of his agent, the former was to pay demurrage, at the rate of twenty dollars per day for every day the vessel was so detained. Reference was made in the charter-party to Heman S. Hinds, and to no other person, and the whole evidence shows that he procured the spars for the respondent, furnished them to the libellant at the place of loading, and was in point of fact interested in the profits to be made by the adventure. When about two thirds of the spars were loaded, it was discovered that the vessel drew seven feet of water, and the agent of the charterer for shipping the spars and the master of the vessel; both agreed in opinion, that the vessel could not safely undertake to carry any more over the bar at the mouth of the river, or through the inlet mentioned in the pleadings. Five witnesses examined by the libellant, including the mate of the vessel, and four of the crew, testify to this fact; and although there is some testimony introduced by the respondent, tending to contradict their statements, that the agent of the charterer concurred in this opinion, yet it is not of a character to affect their credit. That opinion was given, upon the assumption that a vessel drawing more than seven feet of water could not pass over the bar, or at least that the navigation would be dangerous. He was well acquainted with the navigation, and being interested at least to a certain extent that the whole of the spars should be taken, it is not reasonable to suppose that he would under estimate the depth of water, or magnify the danger of overloading the vessel. As appears from the evidence, the island mentioned in the charter-party is some twenty-five miles up the river from its mouth; and to reach the river from the open sea it is necessary to pass Hatteras Inlet, and thence through the sound, a distance of some seventy-five or eighty miles. By the terms of the charter-party,

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the charterer stipulated and guaranteed that there was eight feet of water at the place of loading. It appears from the evidence that the respondent examined the vessel, and had the opportunity of ascertaining what depth of water would be required to enable her to accomplish the voyage. He had previously been at the place of loading, and seen the spars on the landing, and was well acquainted with the character of the river. On the other hand, the libellant had never sailed up the river, or been at the place of loading, and had no means of knowing the depth of the water in the river, or at the inlet, or on the bars. At the place where the spars were shipped the water is eight feet deep or more; but the weight of the evidence clearly shows that it is not more than seven, or at most more than seven and a half, feet deep on the bar at the mouth of the river or on the bar at the inlet. Testimony was introduced by the respondent, tending to show that the depth of water is greater, but the circumstances disclosed in the case lead to the conclusion that his witnesses are mistaken. Some seventy-five spars or more remained, when it was ascertained that the vessel could take no more. Both the master and the agent of the charterer who furnished the spars were anxious that the whole should be transported; but they agreed that the vessel was fully loaded for the passage down the river, and to the open sea. Those remaining on the bank were rolled into the river and rafted, and in that manner taken in tow by the vessel. That course was adopted with the expectation that the vessel, after passing the lower bar at the inlet, would come to anchor, and that the master and crew would then be able to take them on board. Accordingly, they were formed into a raft constructed in three parts, arranged one after the other, and fastened together with a large hawser, with cross-lashings to each part made of manilla rigging, to prevent the spars from separating. Much conflict exists in the testimony as to who first suggested the expediency of making the raft. All things considered, the better opinion from the evidence is that it was suggested by the person representing the charterer. At all events, he consented that it should be made, superintended its construction, and pronounced it sufficient after it was done. His statement

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that he objected to that mode of transporting the remainder of the spars, or that he suggested that the master should wait till the depth of water on the bar was increased by a change in the wind, needs further confirmation. Both he and the master agreed that the vessel could take no more at the landing, or until she reached the open sea ; and they both went to work and constructed the raft, using the best materials they had for the purpose. After the raft was constructed it was fastened to the vessel by a hawser, and the vessel sailed for the inlet with the raft in tow. She was so deeply laden, or the water was so shoal, that she once grounded going down the river, dragged badly nearly all the way, and struck three times on the bar at the mouth of the river. All of the witnesses for the libellant agree substantially that they did not find the depth of water in the river but seven feet and five inches, and only seven feet on the bar. Just before the vessel reached the bar the wind increased, and after passing over it she encountered a sharp chopping sea, which chafed and broke the lashings of the raft, causing the spars to go adrift, and most of them were lost. Some eight or ten were picked up by the crew, which, together with all those on board, were safely transported and duly delivered according to contract. It is insisted by the respondent that the libellant is not entitled to recover, because, as he contends, the contract was to pay a round sum for an entire service, and consequently that the performance of the service was by the terms of the contract a condition precedent to the earning of freight. As a general rule, undoubtedly, the delivery of the goods at the place of destination, according to the terms of the charter-party, is necessary to entitle the owner of the vessel to the stipulated compensation. 3 Kent's Com. (9th ed.) 298; *Cook v. Jennings*, 7 T. R. 381; *Bright v. Cowper*, 1 Brownl. 21; *Towle v. Kettell et al.*, 5 Cush. 18; *Coffin v. Storer*, 5 Mass. 252; *Barker v. Cheriot*, 2 Johns. 352; *Blanchard v. Buckman*, 3 Me. 1. Right delivery is as essential to the performance of such a contract, and consequently to the right of the carrier to recover compensation, as safe custody and due transport. To this also may be added, that entire contracts of this nature cannot in general be apportioned, so that if a party

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undertake for a round sum to transport a specified quantity of merchandise from one place to another before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion of the undertaking was prevented by accident. Chitty on Con. 736. In its nature the contract for conveyance of merchandise is an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended on the partial conveyance. Courts of justice, however, have recognized certain equitable exceptions to this general rule, and those exceptions are as well known and fully established by decided cases as the rule itself. Of these one only need be noticed at the present time. If the owner of the cargo is the cause of its not being transported to the port of destination, full freight may be recovered. *Bork v. Norton*, 2 M'Lean, 422; *Clark et al. v. Crabtree*, 2 Cur. 87; *Giles v. The Brig Cynthia*, 1 Pet. Adm. R. 207; *Kleine v. Catara*, 2 Gall. 61; *The Nathaniel Hooper*, 3 Sumn. 542; *Clendaniel v. Tuckerman*, 17 Barb. S. C. 184. On the part of the libellant, it is insisted that he was prevented from transporting the remainder of the spars solely by the fact that the depth of water in the river, and on the route to the open sea, was not sufficient to justify him in taking the remainder on board. He admits that the water was eight feet deep or more at the place where the spars were shipped; but insists that, by the true construction of the charter-party, the guaranty of eight feet of water applies as well to the bar at the mouth of the river, and all the way to the open sea, as to the place where the spars were furnished by the agent of the charterer. That proposition is denied by the respondent, who contends that the guaranty only applies to the place where the vessel lay when she received her cargo. Like other commercial instruments, charter-parties ought to receive a liberal construction, agreeable to the intentions of the parties, and conformably to the usage of trade, and of the particular trade to which the contract relates. Whenever the language of a contract is ambiguous, the intention of the parties is the primary rule of construction; and, in order to ascertain the true sense in

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which the language was employed, it is not only allowable, but often necessary, to examine the attending circumstances, and to weigh the language in connection with the subject-matter to which it was applied. Tested by this rule, there can be no doubt as to what was the real purpose and object of the guaranty. Confining the investigation within the strictest limits, it still appears that the respondent wanted a quantity of spars transported from the banks of a certain river in the State of North Carolina to certain ports in the State of Massachusetts. He made proposals to charter the vessel of the libellant to transport the spars. At the time the proposals were made, charterer knew, or had the means of knowing, what depth of water would be required to enable the vessel to perform the required service; but the libellant had never been at the place of loading, and had no means of obtaining knowledge upon the subject. Inquiry would have been useless, as there were no charts, and seafaring men know little of the river, and were unacquainted with the navigation. Want of knowledge and the means of information would naturally suggest doubts in the mind of the libellant whether the service could safely be performed by the vessel. To remove those doubts, and to protect himself against loss in case they should prove to be well founded, he required the guaranty. He must have known that a sufficient depth of water at the landing would be of little use, if the vessel could not get out of the river after the cargo was laden on board. To suppose that the guaranty went no further than to require eight feet of water at the landing, would be to impute a want of ordinary intelligence or prudence to the libellant, and a course of conduct on the part of the respondent little better than an actual fraud. Such a construction would be both unjust and unreasonable, and therefore cannot be sustained. In view of the attending circumstances, there can be no doubt that the guaranty required that there should be eight feet of water, or at least a sufficient depth to enable the vessel to perform the voyage from the place where the spars were to be shipped to the open sea. That guaranty was a condition precedent to the right of the respondent to claim performance on the part of the libellant. When the libellant had taken on board as many spars as the depth of

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water in the river and on the bar would enable the vessel to carry, he might well, under the circumstances of this case, have returned to the port of destination and claimed full freight. His contract would then have been performed as far as it was in his power to perform it, and to the extent that there was a failure of performance, that failure would have been caused by the respondent. But he did not do so, and the only remaining question of any importance is, whether his subsequent acts have the effect to vary or defeat his right to recover. All that he did in rafting or assisting to raft the remainder of the spars was done by the consent and with the concurrence of the agent of the shipper. They were voluntary acts, performed without compensation or the promise of compensation. Nothing can be plainer than the proposition that the charter-party made no such requirement and contemplated no such mode of transportation. . Whether the rigging used for lashings was suitable or not, it was the best the master had ; and the raft, when it was completed, was pronounced sufficient by the agent of the shipper who superintended its construction. Every effort in his power was made by the master to tow the spars in safety to the inlet ; and when the lashings broke and they went adrift, both he and the crew did all that could be done to save them. For the want of a sufficient depth of water the vessel was delayed in her passage down the river, and before she reached the bar the wind increased. After passing the bar, the lashings of the raft were broken by the force of the waves. Some few of the spars were saved, but the larger portion were lost. Under these circumstances, I am of opinion that the spars were lost by a peril of the sea, and that the acts of the master in relation to the raft do not defeat or impair his right to recover on the original contract. Certain other defences are set up by the respondent which will be briefly noticed. In the second place he insists that the master should have employed lighters to carry down the remaining spars to his vessel after she had passed the bar at the mouth of the inlet. That proposition is based upon certain evidence in the case tending to show that such was the usage on that river. Two answers may be given to the proposition, either of which is conclusive against it. Allowing due

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weight to the evidence, it is not sufficient to prove any such general usage. But suppose the fact to be proved, as assumed by the respondent, still it cannot have the effect to vary the written contract. By the express terms of the charter-party, the delivery of the spars for the purpose of loading was to be made within reach of the vessel's tackles, so that, if any lightering was required, it was to be done by the agent of the respondent, and not by the libellant. When the language of the contract is ambiguous, parol evidence of the usage is generally admissible to enable the court to arrive at the real intention of the parties; but it is not admissible to vary, contradict, or defeat express stipulations or provisions restricting or enlarging the customary right. Add. on Con. (ed. 1857), 851; Abb. on Ship. 350; 3 Kent's Com. (9th ed.) 345; *Palmer v. Blackburn*, 3 Bing. 61; *The Reeside*, 2 Sumn. 567; *Trueman v. Loder*, 11 Ad. & E. 589; *Donnell v. Colum. Ins. Co.*, 2 Sumn. 377.

It is also insisted by the respondent that the master should have shipped the whole of the spars, and waited with his vessel at some point above the bar, at the mouth of the river, until, by a change of the wind, the depth of the water on the bar had been sufficiently increased to have enabled the vessel to pass over it and proceed on her voyage. That proposition assumes, contrary to the weight of the evidence, that the depth of the water down to the bar, at the mouth of the river, was already sufficient; and in addition to that it also assumes, what is not satisfactorily proved, that a change of the wind would have had the effect to increase the depth of the water to such an extent, not only on the bar at the mouth of the river, but also on the bar at the inlet at the same time, that the vessel could have proceeded to the open sea. No such requirement as the one assumed in the proposition is found in the terms of the charter-party, and the weight of the evidence clearly shows that nothing of the kind was ever suggested by the agent of the shipper. On the contrary, he first suggested that the vessel could take no more of the spars at the landing, and if he did not first propose the making of the raft, he very readily consented to the suggestion, and superintended its construction. His relative wrote the bills of lading, and he ad-

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mits that he sent one of them to the respondent to enable him to effect an insurance.

Some of the spars were shipped directly from the bank, and were put on board through the ports of the vessel. One of the ports was cut deeper and enlarged for that purpose as much as possible without damaging the vessel, but, notwithstanding this enlargement, it was still too small to receive the butts of some of the largest spars. To remedy that difficulty the butts were hewn or scarfed, so that they could be put on board in that way. All of that work, however, was done by the agent of the shipper, and not by the libellant, as appears by his own testimony. In view of the whole case, I am of the opinion that the decision of the District Court was correct, and the decree in the case must therefore be affirmed with costs.

RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1859.

CHARLES F. JAMES AND WIFE v. ROBERT L. THURSTON *et al.*

Awards are to be liberally construed, because they are made by judges of the parties own choosing, but they must decide the whole matter submitted to the referee, and they must be certain, final, and conclusive of the whole matter referred.

THE facts as set forth in the pleadings fully appear in the opinion of the court.

Thomas A. Jenckes, for complainants.

Benjamin F. Thurston, for respondents.

CLIFFORD, J. This is a bill in equity brought by the complainants against Robert L. Thurston, Henry W. Gardner, and Gideon J. Hicks, copartners under the firm of Thurston, Gardner, and Company. Among other things complainants allege that Henry W. Gardner, acting for the firm, made a conveyance of one fourth part of all the property of the firm to Alfred R. Fiske, who

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transferred to him certain stocks of the Grafton Mills, amounting to six thousand dollars, and upon the delivery of the deed of the property the grantee became a member of the firm ; that the consideration of the purchase was twenty-three thousand dollars ; that the remainder was paid as follows : Charles T. James made, signed, and delivered to the respondents three promissory notes, antedated as of August 16, 1852. One for six thousand dollars, payable in two years ; another for the same amount, payable in three years, — both indorsed by Alfred R. Fiske ; and one for five thousand dollars, payable in two years. And the first-named complainant agreed in writing to render services for the firm by using his influence to procure contracts for the manufacture of machinery ; and the firm agreed, upon the completion of each contract and payment for the work done under the same, to credit the complainants with a commission of five per cent, to be applied to the payment of their notes. They also allege that Charles T. James received nothing for the notes ; that the agreement was that they were to be held as collateral security for the indebtedness of Alfred R. Fiske, to be paid by him in services to be rendered by him as the head of the mechanical department of the establishment. Fiske continued a member of the firm from the 29th of October, 1852, and was entitled to one fourth part of all the property ; but on the 23d of June, 1857, he conveyed to Henry W. Gardner, for the benefit of the concern, all his interest in the property, and withdrew from the firm ; that on that day it was agreed in writing that if Fiske or any other person for him should, within five years from that time, pay the amount of his indebtedness as aforesaid, then he, the said Henry W. Gardner, would convey to Phebe Fiske, wife of said Alfred R. Fiske, one fourth part of all the property belonging to the firm ; and they aver that both said instruments were executed and delivered without the knowledge of the complainant. Having stated these preliminary facts, they then alleged that the respondents, including said Alfred R. Fiske, commenced a suit against the said James as the maker of the two notes first named, in the Supreme Court of the State, recovered judgment, and levied the same on certain real estate therein described as the

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property of the judgment debtor. As alleged, the respondents also commenced a suit on the other note, recovered judgment, and levied the same on certain personal property, as the property of the complainant, but which the complainants aver was the sole and separate property of Lucinda James, the wife of the said Charles T. James. They also allege that on the 31st of December, 1859, Alfred R. Fiske and wife, for a valuable consideration, conveyed to the said Lucinda James all their estate, title, and interest in the property and effects of the before-mentioned firm; that the respondents have constantly carried on the business, made large profits; and they aver that the share of said Fiske is more than sufficient to pay his indebtedness. Wherefore they pray for an account and for a statement of the affairs of the concern and for redemption.

Respondents appeared and made answer to the suit, and a general replication was filed by the complainants. At the June Term, 1860, by agreement of the parties, the cause was referred to Edward A. Dickenson, as sole referee. He made a report on the 7th of October, 1861. Complainants excepted to the report of the referee, for the reason that the same did not decide the whole matter submitted to him, and that it was not certain, final, and conclusive of the whole matter referred.

Looking at the conclusion of the report, it is evident that the objections to it are well taken. Awards are to be liberally construed because they are made by judges of the parties' own choosing; but they must decide the whole matter submitted to the referee, and they must be certain, final, and conclusive of the whole matter referred. *Carnochan et al. v. Christie et al.*, 11 Whea. 446; Cald. on Arbt. Smith, 226. Suffice it to say that the report is clearly deficient in all these particulars; hence it seems unnecessary to pursue the subject. The report, therefore, is set aside, and as neither party asks for a recommitment, the cause must stand for trial in this court.

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MAINE DISTRICT.

APRIL TERM, 1860.

CHARLES SCUDDER, Administrator in Equity, v. THE CALAIS STEAMBOAT COMPANY.

Under a contract for building an entire vessel, no property vests in the party for whom the vessel is built, until she is ready for delivery, and has been approved or accepted by such party ; but that general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent, and payments for her, based upon the progress of the work, are to be made by instalments as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner.

Delivery of a vessel by the builders of the hull thereof to one as agent of the real owners, of itself vests no title in such agent, although the builders had no knowledge of the capacity in which the vessel was received by him. Unaccompanied by a written conveyance, such delivery must be understood as vesting the title in the real owners, and the taking of a bill of sale by such agent four months afterwards could not have the effect to divest the owners' title, and vest it in the agent.

In the United States the title to a vessel may pass by delivery under a parol contract.

If itself, the register is not evidence of property, unless confirmed by auxiliary circumstances to show that it was made by the authority or with the assent of the person named in it, and who is subject to be charged as owner.

A purchaser of a vessel from a person holding the same in trust for the real owners, having notice of the trust, is in no better situation than the seller.

THIS was a bill in equity, brought by the complainant as administrator of the estate of John Van Pelt, formerly of San Francisco, in the State of California, deceased, to compel the corporation respondents to convey to him, as such administrator, all such title as they might have acquired, or claimed to have acquired, in thirteen-twentieth parts of a certain steamboat called the Adelaide, and to account to him for the same proportion of the net profits of the steamer during all the time she had been in their employ. John Van Pelt died in San Francisco on the 29th of September, 1853 ; and in the month of October following, Horace P. Janes, Richard Chenery, and Frank Johnson were duly appointed administrators of his goods and estate,

by the Court of Probate for the county of San Francisco. Having fully administered the estate, they were discharged from the trust, October 30, 1854. During this period the steamer in question was in the process of construction in New York; and the complainant alleged that the administrators appointed in California never assumed any control over her, or in any way made themselves liable for her, and never authorized any person to make sale of her. The complainant, as administrator appointed in the county of Cumberland, in the State of Maine, alleged that the intestate in his lifetime, during the month of May, 1853, at San Francisco, employed one William W. Vanderbilt to make a draft for a steamer of this description; to proceed to the State of New York as his agent, and there to contract for and superintend the building of the same; that being then concerned with others in navigation on the waters of California, he did not wish it to be publicly known that he was building a steamer to be used on those waters, and therefore instructed his agent that the contracts for the hull and engines should be made in the agent's name, and that the steamer, when completed, should be so enrolled at the custom-house. When completed, she was to be sent to California, and there wholly transferred to the principal, unless the agent should become interested in her to the extent of two-twentieth parts. Pursuant to this arrangement the decedent, in the month of September, 1853, agreed with one Richard Chenery of San Francisco, that he should become the owner of seven-twentieth parts of the steamer, four twentieths for himself and three twentieths for one Richard M. Jessup, who also lived in San Francisco. Chenery accordingly paid him seven twentieths of twenty thousand dollars first advanced; and to provide further funds for the construction of the vessel, they made a mortgage of certain other steamers to certain bankers, as a security for letters of credit to the amount of sixty thousand dollars. Forty thousand dollars were thus raised, and the money expended in building the steamer. Thirteen twentieths of the amount were paid by the administrators of the decedent, and the residue by the other party to the arrangement. Other drafts were afterwards made for the same purpose, so that

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the administrators paid out of the decedent's estate forty-eight thousand one hundred and twenty-six dollars and twenty four cents, which, with what had been before advanced, fully paid for thirteen twentieths of the steamer when completed.

To the bill as originally framed respondents demurred, and the court sustained the demurrer, but gave the complainant leave to amend upon payment of costs. In the amendment the complainant alleged that Chenery and Jessup were citizens of California. He also alleged that the respondents had in some way extinguished their equitable title to the steamer; and those parties, having acquiesced in her sale, were no longer tenants in common with him in the steamer.

The respondents alleged that in July, 1854, being in want of a steamer to run between Boston and St. John, they employed one William Denning to purchase one for them; that their agent proceeded to New York and entered into a contract with William Vanderbilt, who represented himself as the owner of the steamer, that said Vanderbilt should fit, furnish, and convey the steamer to them. When the steamer was completed Vanderbilt took out a builder's certificate and conveyed the steamer to Denning, who paid for her eighty-eight thousand dollars, money furnished him by the respondents. Conveyance was made to the agent because respondents had not passed the vote authorizing the purchase of the steamer when the conveyance was executed. The steamer was afterwards conveyed to the respondents, September 20, 1854. Respondents alleged that the agent, at the time of the purchase, was wholly ignorant of any claims of decedent on the steamer, and had good reason to believe and supposed that Vanderbilt was her true owner.

Shepley and Dana, for the complainant.

The title to thirteen twentieths of the *Adelaide*, as belonging to the estate of J. Van Pelt, may be established without proof of any bill of sale or written document. And a registry and bill of sale are not conclusive. Title may be acquired by building or purchase. *Abbott on Ship*. 1 – 6 (5th Amer. ed.); 3 *Kent's Com.* 150; *Story on Partnership*, § 417; *Colson v. Bonney*, 6 *Greenl.* 474; *Badger v. Bank of Cumberland*, 26 *Me.* 428;

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Richardson v. Kimball, 28 Me. 463; *Holmes v. Sprowl*, 31 Me. 75; *Barnes v. Taylor*, 31 Me. 334; *Mitchell v. Taylor*, 32 Me. 437; *Bixby v. Franklin Ins. Co.*, 8 Pick. 86; *Lord et al. v. Ferguson*, 9 N. H. 380; *Weston v. Penniman*, 1 Mass. 317; *De Wolf v. Harris*, 4 Mass. 533. No legal title of thirteen twentieths of the *Adelaide* has passed from the estate of John Van Pelt to the defendants.

"The general rule is, that no person can convey who has no title; and the mere fact of possession by the vendor is not of itself sufficient to give title." 3 Kent's Com. 130, 131; *Williams et al. v. Merle*, 11 Wend. 80. The general rule is not denied, that under a contract for building an *entire* vessel, no property vests in the party for whom she is built, until she is ready for delivery, and has been approved or accepted by him. *Mucklow v. Mangler*, 1 Taunt. 318; *Stringer v. Murray et als.*, 2 B. & A. 248; *Merritt v. Johnson*, 7 Johns. 473; Abbott on Ship. 1-6 (5th Amer. ed.). This general rule does not prevail when a vessel is built under superintendence from the party for whom she is built, and payments for her are made by instalments as the work progresses. In such case the person for whom she is built is the owner. *Woods et al. v. Russell*, 5 B. & A. 942; *Atkinson et als. v. Bell et als.*, 8 B. & C. 277; *Clark et als. v. Spence et als.*, 4 Ad. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; Chitty on Con. 378, 379 (6th Amer. ed.). A written agreement that one shall have a part of a vessel then building when completed passes no title. *Bonsey v. Amee*, 8 Pick. 236. If the court should consider that the defendants have acquired a legal title to the thirteen twentieths of the *Adelaide*, that title was held by the vendor in trust; and it continues to be chargeable with the same trust as held by the defendants, they not being purchasers for value, without notice.

Vanderbilt held whatever title he had in trust. The legal title to a vessel may be in one person and the equitable interest in another. *Weston v. Penniman*, 1 Mass. 318. Notice to an agent is notice to his principal. Com. Dig. Chan. 4, c. 5; *Maddox v. Maddox*, 1 Ves. Jr. 62; *Fulton Bank v. Canal Co.*, 4 Paige, Ch. 127; *Bank of Alexandria v. Seton*, 1 Pet. 309. A pur-

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chaser with notice is bound in all respects as his vendor was. *Taylor v. Stibbert*, 2 Ves. Jr. 437. Whatever puts a party on further inquiry is sufficient notice in equity. Com. Dig. Chan. 4 C. 2; *Smith v. Lowe*, 1 Atk. 489; 2 Sug. Vend. & Pur. 471, 472 (10th Eng. ed.); *Jackson v. Rowe*, 2 S. & S. 472; *Kennedy v. Green*, 3 Myl. & K. 719, 721, 722; *Jones v. Smith*, 1 Hare, Ch. 43; *Booth v. Barnum*, 9 Conn. 286; *Pitney v. Leonard et al.*, 1 Paige, Ch. 461; *Hawley et al. v. Cramer et als.*, 4 Cowen, 717; *Carr v. Hilton*, 1 Cur. 390; *Williamson v. Brown*, 20 Law Rep. 397.

B. R. Curtis and *H. C. Hutchins*, for respondents.

The respondents purchased the steamboat of Vanderbilt, and paid her fair and full value. Vanderbilt had possession and the record title. Respondents therefore took the legal title. This bill can be maintained on this ground only, otherwise complainant's remedy is at law. If Vanderbilt held his title subject to a trust, the complainant, to maintain this bill, must affect respondents with notice of that trust. No express notice will be claimed, and no implied notice is proved by the testimony. To constitute implied notice of a trust of this character, the evidence must be sufficient to show fraud on the part of the respondents. *Jones v. Smith*, 1 Hare, Ch. 43. Van Pelt's interest, if any, was to be kept secret; and since his death, no one has changed this arrangement. Having thus clothed Vanderbilt with title, Van Pelt and his representatives are estopped from setting up any claim to the vessel. *Pepper v. Haight*, 20 Barb. 429.

Shepley, in reply.

Ordinary prudence is required of the purchaser respecting the title of the seller. *Hill v. Simpson*, 7 Ves. Jr. 170. The purchaser must in equity be fixed with all the knowledge which it was reasonable that he should acquire, and he is bound to use due diligence in the investigation of the title. *Jackson v. Rowe*, 2 S. & S. 472. Whatever notice is enough to excite attention, and put the party upon his guard, and call for further inquiry, is notice of everything to which such inquiry might have led. *Kennedy v. Green*, 3 Myl. & K. 719; *Carr v. Hilton*, 1 Cur. 390. When it appears that a purchaser must have had a suspicion of

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the truth, and that he designedly avoided to receive actual notice, he is to be regarded as having notice. *Jones v. Smith*, 1 Hare, Ch. 43. When a trust is established, equity will follow the legal title, and decree that those in whom it is vested shall execute the trust. "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." *Taylor v. Plumer*, 3 M. & S. 574. Notice of a trust makes a person a privy. Com. Dig. Chan. 4 C. 1. As to the general proposition. Com. Dig. Chan. 4 I. 4; *Bovey v. Smith*, 1 Vern. 149; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Bank of Alexandria v. Seton*, 1 Pet. 299; 2 Story's Eq. §§ 976, 1257.

CLIFFORD, J. Most of the facts respecting the title of the complainant as alleged in the bill of complaint are substantially and satisfactorily established by the evidence. Thirteen-twentieth parts of the steamer were built from moneys furnished by the decedent or procured from credits provided by him in his lifetime, and were adjusted and paid by his administrators as legal debts against his estate. Full proof is exhibited that the draft of the steamer was prepared by Vanderbilt as the agent of the decedent, and as such he went to New York to make the contracts for the building of the same and to superintend her construction. Twenty thousand dollars were advanced by the decedent towards the enterprise in his lifetime, and he and Chenery procured a letter of credit from Page Bacon & Co. for fifty thousand dollars for the same purpose. Forty-eight thousand one hundred and ninety-four dollars and fifty-seven cents were obtained on the letter of credit; and the accounts settled in the Probate Court show that the whole amount was paid by the administrators of the decedent to redeem the property pledged as security for the letter of credit. When Chenery agreed to take seven-twentieth parts of the steamer, he assumed that proportion of the moneys first advanced, so that the whole amount paid by the decedent and by his administrators from his estate was sixty-one thousand one hundred and ninety-four dollars and fifty-seven cents; and the evidence satisfactorily shows that the amount thus advanced fully paid for thirteen-twentieth parts of the steamer when completed and furnished. Vanderbilt had no

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interest in the steamer, and never made any advances toward her construction, except what had been adjusted and refunded to him by David P. Vail, the agent of the owners, long before the steamer was completed. He left certain bonds and notes with the decedent in his lifetime for collection, amounting to the sum of four thousand dollars, but they proved to be worthless, and remained with the papers of the estate for his benefit. All the contracts for building the steamer were made by him in his own name, but the evidence clearly shows that in all these transactions he was in point of fact the agent of the decedent, from whom or from whose estate all the funds were received, except what was advanced by the owner or owners of the other seven-twentieth parts of the steamer which is not claimed by the complainant. After the arrangement was made with Chenery, as alleged in the bill of complaint, he and the decedent sent David P. Vail to New York to superintend the completion and furnishing of the steamer, and to close up the concern, pay the accounts, and navigate her to California. That arrangement was made at Sonoma in the State of California, where the decedent was then sick, and was to the effect that Chenery should take seven-twentieth parts of the steamer for himself and Jessup, as stated in the bill of complaint, and that he should have the agency of the whole matter. He adjusted and paid Vanderbilt for all of his services and advances in the premises, and the latter wrote to one of the heirs of the estate that his claims in that behalf were all paid, and that he had passed everything over to the new agent, and had "nothing more to say about the boat." That communication was dated on the 5th of July, 1854, and from that time to the time when the steamer was completed, it is clear, from all the evidence, that whatever he did in the premises was done in subordination to the new agent. Without entering more into detail, suffice it to say that the evidence is full and clear that thirteen-twentieth parts of the steamer were built from moneys and credits furnished by the decedent in his lifetime, and that both Vanderbilt and Vail were mere agents of the party or parties interested in the completion of the work. According to the statement of Vanderbilt, his agreement with

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the decedent was made at San Francisco, about the 1st of May, 1853, but the evidence tends to show that it was made somewhat later. He made contracts in his own name for the building of the hull and engine, and for the carpenter and joiner work, and for the painting of the vessel. All of the contracts, except that for the building of the hull, provided for performance to his satisfaction; and the payments were to be made at different times, as the work was done. By the terms of the first-named contract, the hull was to be completed in four months from the 7th of July, 1853; and the evidence shows that the vessel was launched and delivered to Vanderbilt in December following. After being delivered, she was taken to New York, and in a few days subsequently to her arrival there the proper contractors commenced to put in her engines. Vanderbilt states expressly that she was delivered to him on the day she was launched, and that she was ready for sea and made a trial trip in April or May, 1854, but was not then finished. More than fifty-six thousand dollars were expended in her construction and equipment, in addition to the sum of twenty thousand dollars paid to the builders of the hull. On the 7th of April, 1854, four months after the builders of the hull had delivered her to Vanderbilt, without reservation or condition, he took from them a bill of sale of the whole steamer, in consideration of twenty thousand dollars as therein expressed, with covenants of general warranty applicable to the whole interest and value of the steamer. When that bill of sale was given no builder's certificate had been filed in the custom-house, but on the 22d of May following the builders of the hull filed in that office a certificate in the usual form, certifying that the steamer had been built by them at Greenport, in 1854, and that she was owned by William W. Vanderbilt. At whose request that certificate was made does not appear, but on the 9th of September following Vanderbilt had the steamer enrolled in his own name, and on the same day he and Vail made the conveyance to the agent of the respondents in pursuance of a prior contract, as alleged in the bill of complaint. On this state of facts, and by virtue of the instruments above mentioned, it is insisted by the respondents that William W. Vanderbilt was the

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sole owner of the steamer, and that their agent acquired a full and perfect title to the whole of the interest now claimed by the complainant. To that proposition I cannot assent, for several reasons.

It is clear that the builders of the hull, at the time they conveyed to Vanderbilt, had no title or interest in the steamer. By the contract under which they built the hull, they were to be paid by instalments as follows, to wit, five thousand dollars when the keel was laid, five thousand dollars when the vessel was in frame, five thousand dollars when she was planked and her deck laid, twenty-five hundred dollars when she was ready to be launched, and the balance of twenty-five hundred dollars when the carpenter work was finished. Having received those several sums at the times they respectively fell due, in full compensation for their services, and delivered the steamer without reservation or condition, it is quite evident that they retained no interest whatever in the vessel which they could convey to any one. They built the hull only, and never had any title or claim in the entire vessel. Fifty-six thousand dollars in addition to the contract price of the hull had been expended upon the vessel before the sale to the respondents. Nothing can be plainer from the evidence than the proposition that the builders of the hull never owned the entire vessel. Beyond question, the general rule of law is, that under a contract for building an entire vessel no property vests in the party for whom she is built until she is ready for delivery, and has been accepted or approved by such party. *Mucklow v. Mangler*, 1 Taunt. 318; *Stringer v. Murray*, 2 B. & Ald. 248; *Merritt v. Johnson*, 7 Johns. 473; Abbott on Ship. 5. But that general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent; and payments for her, based upon the progress of the work, are to be made by instalments as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner by all the well-considered decisions upon the subject. *Woods v. Russel*, 5 B. & Ald. 942; *Atkinson v. Bell*, 8 B. & Cres. 277; *Clark v. Spence*, 4 Ad. & El. 448; *Laidler v. Burlinson*, 2 M. & W. 602. Mr. Chitty

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says, where the contract provides that the article shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payments by instalments regulated by particular stages in the progress of the work, the general property in the materials vests in the purchaser at the time when they are used, or at all events as soon as the first instalment is paid. Chitty on Con. (7th Amer. ed.) 378, 379. All the cases agree that where the contract has been completed, and the vessel has been finished and delivered to the party for whom she was built, and has been approved by him, the property vests in such party. *Andrews v. Durant*, 1 Ker. 40. Assume the more restricted rule, as last stated, to be the more correct one, still it is broad enough to show that the builders of the hull in this case had parted with all claim of title four months before the date of their bill of sale to Vanderbilt.

By that delivery Vanderbilt acquired no interest in the steamer for the reason that in accepting it he acted as the agent of the party or parties who furnished the means to pay the consideration. He took no written conveyance at the time, and the whole case shows that he did not then contemplate any fraud upon the rights of those he represented in accepting the delivery. His services and claims were all subsequently paid by the new agent, and in July, 1854, he expressly declared that he had nothing more to say about the boat. Delivery to him as agent of the real owners could not of itself vest any title in him, although the builders of the hull had no knowledge as to the capacity in which he was acting. Unaccompanied by any written conveyance, and with no intent on his part to appropriate the property to his own use, such delivery of the vessel to him as agent of the party or parties for whom it was in fact built must be understood as vesting the title in the real owners, and his subsequent act in taking the bill of sale from the builders four months afterwards could not have the effect to divest such owners of the title and vest it in him as their agent. In the opinion delivered by Mr. Justice Curtis at the hearing on the bill of complaint, he proceeded upon the ground that the legal title was in Vanderbilt, and that it passed to the agent of the respondents

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under the bill of sale executed by him and Vail. But that opinion was given upon the case as then exhibited in the bill of complaint, without any knowledge of the facts since disclosed in the evidence. Unlike what was then exhibited, it now appears that the claims of Vanderbilt had been fully settled and satisfied, and that he had expressly disclaimed all interest in the steamer. He and Vail combined together, took out the builder's certificate in the name of the former, obtained the enrolment in his name as sole owner, and jointly conveyed the steamer to the agent of the respondents. Instructions undoubtedly were at one time given to Vanderbilt by the decedent to have the steamer enrolled in his name; and it is equally certain that other instructions were subsequently given designating other parties as part owners, but all of those instructions were superseded when the new agent was sent to New York to close the accounts and navigate the steamer to California. No such instructions were ever given to the new agent, and if those previously given to Vanderbilt were not expressly superseded, it must be considered that they were terminated at the death of the decedent. At most, the builder's certificate and the enrolment are only evidence of title, but under the circumstances of this case they are not conclusive evidence. Title may be acquired by building or by purchase, and it may be established, especially when acquired in the former mode, without the exhibition of any bill of sale or other written evidence. In the United States it is well settled that at common law the title of a vessel may pass by delivery under a parol contract. *Bixby v. Franklin Ins. Co.*, 8 Pick. 86; *United States v. Willings*, 4 Cran. 55; *Badger v. The Bank of Cumberland*, 26 Me. 428; *Windover v. Hodgeboom*, 7 Johns. 308; *Vinal v. Barrell*, 16 Pick. 401; *Leonard v. Huntington*, 15 Johns. 298; *Thorn v. Hicks*, 7 Cow. 699; *Fontaine v. Beers*, 19 Ala. R. 722; *Pars. Mer. L.* 329; *Colson v. Bonney*, 6 Me. 474; *Richardson v. Kimball*, 28 Me. 463; *Holmes v. Sprowle*, 31 Me. 75; *Barnes v. Taylor*, 31 Me. 334; *Mitchel v. Taylor*, 32 Me. 437; *Stacy v. Graham*, 3 Duer (S. C.), 452; *Lord v. Furgerson*, 9 N. H. 380; *Weston v. Penniman*, 1 Mas. 317. Registry acts are to be considered as forms of local or municipal institutions for purposes

of public policy. They are imperative only, says Chancellor Kent, upon voluntary transfers of the parties, and do not in general apply to transfers by act or operation of law. 3 Kent's Com. (9th ed.) 208. Of itself, the register, it is said, is not evidence of property, unless it be confirmed by some auxiliary circumstance, to show that it was made by the authority or the assent of the person named in it, and who is sought to be charged as owner. Without such proof, doubts have been expressed whether it is even *prima facie* evidence of ownership. *United States v. Brune*, 2 Wall. Jr. 264; *Tinkler v. Walpole*, 14 East, 226; *Melver v. Humble*, 16 East, 169; *Fraser v. Hopkins*, 2 Taunt. 5; *Sharp v. United Ins. Co.*, 14 Johns. 381; 1 Greenl. Ev. § 494; *Ring v. Franklin*, 2 Hall, R. 1. Upon the same ground and for the same reasons it is competent for the real owner, who claims as builder, to show by parol evidence that his claim is well founded, and that the builder's certificate and registry or enrolment have been fraudulently made and issued in the name of another. Such fraudulent acts cannot confer any interest in the vessel, and if not, a claimant whose title has no other foundation for support cannot convey a good title as against the real owner or his legal representatives, even to a purchaser without notice. *Williams v. Merle*, 11 Wend. 80; *Everett v. Coffin*, 6 Wend. 609; *Prescott v. Deforest*, 16 Johns. 169. But suppose it were otherwise, and that the legal title to the steamer was in Vanderbilt at the time he and Vail gave the bill of sale to the agent of the respondents, still the complainant in this case is entitled to recover, as Vanderbilt, in that view of the case, held the title in trust for the real owners. A purchaser with notice of the trust stands in no better situation than the seller. By the well-settled rules of law, the legal title to a vessel may be in one person and the equitable interest in another. 3 Kent's Com. (9th ed.) 151; *Weston v. Penniman*, 1 Mas. 318; *Ring v. Franklin*, 2 Hall, R. 1. Pars. Mer. L. 328. Notice to the agent is notice to the principal. That rule of law, as applicable to the facts of this case, is too obvious and too well settled by authority to require any argument in its support. Com. Dig. Chan. 4, c. 5; *Maddox v. Maddox*, 1 Ves. Jr. 62; *Fulton Bank v. New York and Sharon*

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Canal Co., 4 Paige, Ch. 127; *Bank of Alex. v. Seton*, 1 Pet. 309. Purchasers with notice are bound in all respects as their vendors were, and have no greater right. *Taylor v. Stibbett*, 2 Ves. Jr. 437.

Ordinary prudence is required of the purchaser, and whatever fairly puts a party on further inquiry is in general sufficient notice in equity. *Jones v. Smith*, 1 Hare, Ch. 43; *Hill v. Simpson*, 7 Ves. Jr. 170; *Smith v. Low*, 1 Atkins, Ch. R. 489; 2 Sugd. on V. & P. 471; *Booth v. Barnum*, 9 Conn. 286; *Pitney v. Leonard*, 1 Paige, Ch. R. 461. Notwithstanding that principle is well settled, still it is unnecessary in this case to invoke its aid, for the reason that the facts and circumstances in proof show, to the entire satisfaction of this court, that the agents of the respondents had full knowledge at the time of the sale that the steamer was built for parties in California; and I am also of the opinion that they were informed that the steamer was about to be claimed by those to whom she belonged, and that they hastened her departure from New York so that such claim might not be successfully made.

One other question only remains to be considered. It was insisted by the opening counsel for the respondents, that, in this view of the case, the remedy of the complainant was at law, and not in equity. That suggestion was based upon the assumption that one tenant in common may maintain an action at law against the purchaser of the common property from his cotenant, in the absence of any conversion of the property or proof of its destruction. But the senior counsel very properly conceded that the law is otherwise, and that under such circumstances the action at law could not be maintained. Considering the law to be well settled as conceded by the senior counsel, further examination of the point is deemed unnecessary. *Lord v. Tyler*, 14 Pick. 163; *Wills v. Noyes*, 12 Pick. 326; *Dain v. Cowing*, 22 Me. 347. In view of the whole case, I am of the opinion that the complainant is entitled to a decree to compel the respondents to make the conveyance as prayed in the bill of complaint, and for an account of the net earnings of the steamer since the purchase. In order to ascertain the amount of the net earnings, the cause must be referred to a master.

MASSACHUSETTS DISTRICT.

MAY TERM, 1860.

THE BARK TANGIER. JOHN H. PIERSON *et al.*, Libellants, v.
SAMUEL RICHARDSON *et als.*, Claimants.

Under the decision of the Supreme Court in Richardson *et al.* v. Goddard *et al.*, 23 Howard, the master of a merchant vessel is fully authorized to continue and complete the discharge of his cargo, and the delivery of the respective consignments on Fast-day, when he had commenced the work prior to the occurrence of that day.

For the purpose of lading or unlading ships engaged in maritime commerce, it is also held that, in the absence of any statute to the contrary, or established general usage, Fast-day must be considered as an ordinary working-day.

THIS was an admiralty appeal in a cause of contract, civil and maritime. The libellants were the consignees of one hundred bales of cotton, shipped at Apalachicola, in the State of Florida, on board the bark Tangier, to be transported to Boston for a specified freight. On the 6th of April, 1856, the bark arrived in safety at the port of destination with the cargo on board; but the libel alleged that the cotton, excepting twenty-five bales, had not been delivered, and that the master neglected and refused to deliver the residue.

Full performance on the part of the respondents was set up in the answer, and it was denied that the libellants had suffered any damage by reason of any neglect or refusal on the part of the owners or their agents.

An amendment to the libel was subsequently filed, in which it was alleged that, on the 7th of April, 1856, the libellants received notice that some of their cotton was landed on the wharf; that they took all such away, except two bales, which were so covered up by other merchandise that they could not then be delivered, and that on the evening of that day the rest of their consignment was still in the vessel, and not in a condition to be removed; that the libellants did not receive notice, and did not know that any more of their cotton had been dis-

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charged from the vessel, or was ready for delivery; that on the morning of the 11th of April the master of the bark informed them that the balance had been destroyed by fire, and that the claimants pretended that it had been taken out of the vessel the day previous and placed on the wharf, of which they were ignorant.

As a further defence, the amendment alleged that if the libellants had received notice, they were still not bound to accept and receive the delivery of the residue on the day it was taken out of the vessel, because the 10th of that month had been set apart by the Governor and Council as a day of "public humiliation, fasting, and prayer," and that, by an immemorial custom and usage sanctioned by law, the annual Fast-day of the State was a day on which no secular labor was performed.

To the amended libel the respondents replied that libellants had notice of the intended discharge of the cargo on the 10th, and had assented thereto, and agreed to receive and take away their merchandise, and that there was no custom among persons engaged in commerce not to do any secular work on Fast-day; but averred that the custom of the port authorized masters of vessels to discharge their cargoes, and that the libellants were bound to receive and take it away.

A decree was entered in the District Court dismissing the libel.

C. P. Curtis and *C. P. Curtis, Jr.*, for libellants.

R. Choate and *J. M. Bell*, for respondents.

CLIFFORD, J. Notice was given to the libellants of the arrival of the vessel, and of the master's readiness to deliver the cotton at the same time, and by the same messenger who notified the other consignees. Some twenty-seven bales or more of the libellants' cotton were discharged on Monday and Tuesday, before the work was suspended by the stevedore. After the notice was received by the libellants, they employed a truckman to attend to the business of removing the cotton from the wharf, and gave him directions in regard to the whole consignment. None of the cotton, however, was removed on Monday, and on Tuesday they were again notified and told that the cotton was out and ready, and that the stevedore had been obliged to suspend the work be-

cause the wharf was blocked up. Failing to get the cotton removed, the master went to their counting-room on Wednesday morning, and told one of the firm that the cotton was lying on the wharf. On that occasion the truckman was sent for, and the master was referred to him for the necessary explanations ; and, as an excuse for his remissness, he said, in effect, that, being much pressed with business, he supposed that he could delay this work for a while. He was examined as a witness, and testified that he went to the wharf on Tuesday, but found none of the cotton, except two bales, which were not accessible, and that he went again on Wednesday, after the interview at the counting-room, and took away twenty-five bales, which were all he could find on the wharf. Near sunset of that day the master says he saw the truckman on the wharf, and that the truckman told him that he would come the next day and take the cotton away, if the stevedore would put it on the wharf. But the truckman expressly denies that he ever held any such conversation. Be that as it may, it is nevertheless clearly to be inferred, from all the circumstances, that he must have known that the work of discharging the vessel would be resumed as soon as the obstacles which had occasioned it to be suspended were removed. All of the other facts respecting the unloading of the vessel are substantially the same as those exhibited in the case appealed to the Supreme Court. Assuming that Thursday was a suitable time for the unlading of the bark and for the delivery of the consignment, it is quite obvious that the acts performed by the master were fully equivalent to an actual delivery of the goods, within the principles laid down in that case. He gave due and reasonable notice of the arrival of the vessel, and of his readiness to deliver the consignment. All the goods were properly discharged from the vessel, and duly landed on a suitable wharf and at a suitable time, and the consignment was properly separated from the others, and the goods so placed upon the wharf as to be conveniently accessible for the purpose of removal. But it is insisted by the libellants that Thursday, being the annual Fast of the State for that year, was not a suitable day for the performance of those acts ; and that is the only remaining question to be considered. Much dis-

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crepancy exists in the testimony of the witnesses upon this point. Some affirm that the custom of the port is not to unlade, deliver, or receive goods on that day. Others state the proposition either with many exceptions or with material qualifications. But the weight of the evidence fully sustains the conclusion that there is no such general custom to abstain from labor on that day as forbids the master of a merchant vessel, in a case where he has previously commenced to discharge his vessel, from completing the unloading on Fast-day, and delivering the consignment. On the contrary, the evidence taken as a whole clearly shows that the custom is not to suspend under such circumstances, but that the stevedores almost invariably continue the work, and when practicable complete it. Such being the state of the evidence, it is clear that the question is closed by the decision of the Supreme Court. *Richardson et al. v. Goddard et al.*, 23 How. 28. Whatever differences of opinion there may be as to the true interpretation of the judgment of the court in that case, all must agree that the master of a merchant vessel, within the principles there laid down, is fully authorized to continue and complete the discharge of the cargo and the delivery of the respective consignments on Fast-day, in a case where he had commenced the work prior to the occurrence of that day. To that extent the decision clearly goes; and in the judgment of this court it goes much further, and fully justifies the position assumed by the counsel of the respondents, that, for the purpose of lading or unlading ships engaged in maritime commerce, Fast-day, in the absence of any statute to the contrary or established general usage, must be considered as an ordinary working-day. Nothing less can be inferred from the language of the court when they say: "This inquiry involves the right of the carrier to labor on that day and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of the ship usually

has a certain number of lay-days. He is bound to expedite the unlading of his vessel in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think proper to keep Saturday as his Sabbath, and to observe Friday as a Fast-day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them ; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as an insurer of his property to suit his convenience or conscience." Other parts of the opinion are to the same effect, and even more decisive ; as, for example, the court say : " The proclamation of the Governor is but a recommendation. It had not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary and not of compulsion, and holiday is a privilege and not a duty. In almost every State in the Union a day of thanksgiving is appointed, in the fall of the year, by the Governor, because there is no ecclesiastical authority which would be acknowledged by the different denominations. It is an excellent custom, but it binds no man's conscience, or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended Fast-day, that all labor should cease, and the day be observed as a Sabbath or a holiday. It is not so treated by those who conscientiously observe every Friday as a fast-day." Having come to the conclusion that the question is controlled by the decision of the Supreme Court, it is unnecessary to enter into any further discussion upon the subject. It being understood that a new hearing was granted at the last term, the proper decree is, that the decree of the District Court be affirmed, with costs.

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PHILO S. SHELTON *et al.* v. ARTHUR W. AUSTIN.

If goods from a foreign country have received damage in the course of the voyage, the importer, in order to obtain a reduction of duties, must demand an appraisal before entry. If he enter the goods at the custom-house at the invoice price before demanding an appraisal, he must pay duties assessed according to the invoice price, and is entitled to no reduction on account of the damage.

THIS was an action of assumpsit brought by the plaintiffs against the defendant, as collector of the port of Boston, to recover back certain duties, which, as they alleged, the defendant unlawfully exacted of them, and which they paid under protest.

The case was presented upon an agreed statement of facts, of which the following is the material part : —

It was agreed that the plaintiffs imported certain hogsheads, tierces, and barrels of molasses into the port of Boston, in the bark or vessel called the Meldon, from Matanzas, in the island of Cuba ; that at the period of exportation of the said molasses from the port of Matanzas, in the island of Cuba aforesaid, it was a sound and sweet article ; and that on its importation into the port of Boston the same was soured, and that said souring took place during the voyage aforesaid.

It was further agreed that there was a material difference between the value of sweet and sour molasses, at the port of exportation and also at the port of importation ; that sweet molasses was of a greater value than sour molasses, and that this molasses was entered at the full value of sweet molasses, and the plaintiffs then demanded to have the damages appraised, ascertained and allowed in the computation of duties ; and that thereupon the said defendant caused the same to be appraised and ascertained, but afterward, (under instructions of the Honorable Secretary of the Treasury,) refused to allow the same, and duties were exacted by him on the invoice value, and were paid, but under protest in writing filed with the said collector at the time of the payment thereof.

Milton Andros, for plaintiffs.

C. L. Woodbury, for defendant.

CLIFFORD, J. All importations subject to an *ad valorem* duty are required to be appraised at the actual market value or wholesale price, at the period and place of exportation ; and, to enable the collector to perform that duty, importers are required to make an entry of their respective importations, which must be accompanied by the invoice ; and it is provided that, if the appraised value of the goods exceeds by ten per cent or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum *ad valorem* on such appraised value. Whenever the invoice value is too low, the importer is allowed to make whatever additions on the entry he may think proper, so as to bring up the entered value to the requirement of the law of Congress, in order to avoid that additional charge, but there is no corresponding provision authorizing the merchant to make any deduction from the invoice valuation, on any pretence whatever.

Short quantity or goods lost or destroyed during the voyage may be deducted, because it cannot be held that such goods ever arrived in port, and the entry at the custom-house is not required to embrace merchandise which was never imported into the United States. Such an entry at the custom-house is required in order that the actual market value of the importation may be appraised and ascertained, and consequently importers are allowed to make such additions to the invoice valuation as may be necessary to make it conform to the truth ; but it is provided by the eighth section of the act of the 30th of July, 1846, that under no circumstances shall the duty be assessed upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding. 9 Stat. at Large, p. 43 ; 11 Stat. at Large, p. 199, sec. 2. Beyond question that provision is still in force, but I am of the opinion that Congress never intended that it should have any application whatever to goods damaged during the voyage, or to goods imported which were unaccompanied with the original invoice. Where goods were damaged during the voyage, or were not accompanied with the original invoice of the cost thereof, the importation was sub-

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ject to appraisement by the act of the 31st of July, 1789, and it was provided that the duties upon such goods should be estimated according to such valuation. 1 Stat. at Large, p. 41, sec. 16. Similar provision was made by the thirty-seventh section of the act of the 4th of August, 1790, and its benefits were extended to articles charged with a specific duty, whether the duty was levied by number, weight, or measure. 1 Stat. at Large, p. 167. More detailed provision, however, was made upon the subject by the act of the 2d of March, 1799, which is the act relied on by the plaintiffs. 1 Stat. at Large, p. 665. Merchandise damaged during the voyage, or of which entry was incomplete, either for the want of the original invoice or for any other cause, was required by the fifty-second section of that act to be conveyed in the parcels or packages containing the same to some warehouse or storehouse to be designated by the collector, there to remain at the expense and risk of the owner or consignee "until the particulars, cost, or value" was ascertained in the mode or modes therein prescribed. Articles which had been damaged during the voyage, whether subject to a duty *ad valorem*, or which were chargeable with a specific duty, either by number, weight, or measure, were required to be appraised, and the appraisers were directed to ascertain and certify to what rate per cent the goods were damaged. And it was also provided that the rate or percentage of damage so ascertained and certified should be deducted from the original amount, subject to duty *ad valorem*, or from the actual or original number, weight, or measure on which the specific duties would have been computed. Importers were required, by the supplemental act passed on the 30th of April, 1818, to declare on oath that the invoice of the goods produced, if the goods were subject to an *ad valorem* duty, exhibited the true value of the goods at the place from which they were imported, and it also prescribed certain new and important regulations touching the appraisement of imported goods and the collection of *ad valorem* duties. Among other things, the twelfth section of the act provides that in all cases where the appraised value shall be less than the invoice value the duty shall be charged on the invoice value in the same manner as if no ap-

praisement had been made. But this provision must have reference only to appraisements made on entry at the custom-house, when the entry is required to be accompanied by the invoice, because it is only in such cases that the entry is necessarily based on the invoice, and this construction is greatly strengthened by the consideration that the fifteenth section of the same act makes a special provision for the assessment of duties upon goods damaged in the course of the voyage, and goods taken from a wreck are by that section placed upon the same footing, and in regard to both classes it is expressly provided that before they shall be admitted to entry they shall be appraised in the manner provided by the ninth section of the act which requires the appraisers to report to the collector the true value thereof when purchased, at the place or places from which the same were imported. Comparing the two sections together, therefore, it is obvious that the former has no application whatever to the regular proceedings prescribed for ascertaining and assessing duties upon goods damaged in the course of the voyage, or upon goods taken from a wreck. Prior to the act of the 20th of April, 1818, there was no act of Congress admitting wrecked goods to entry under any circumstances, or any provision upon the subject, other than what related to goods damaged during the voyage. That act was extended by the act of the 18th of April, 1820, and was in full force when the appraisement act of the 1st of March, 1823, went into operation. 3 Stat. at Large, pp. 563 and 736. Nothing can be more certain than the fact that the twenty-first section of the last-named act prohibits goods damaged in the course of the voyage, and goods taken from a wreck, from being admitted to entry until the same shall have been appraised in the manner provided in the sixteenth section of the same act. By the sixteenth section of the act, the appraisers are required to report the true value thereof, according to the fifth section of the act; and by the fifth section of the act it is provided, in effect, that *ad valorem* rates of duty shall be estimated by adding all charges, except insurance, to the actual cost of the goods, if the same were purchased, or to the actual value thereof if procured otherwise than by purchase, or to the appraised value if the same were appraised, and also a certain

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per centum on the cost or value, depending as to the rate on the place or country from which the goods were imported.

Reference is made to these details only for the purpose of remarking that goods damaged in the course of the voyage are as clearly required to be appraised before they can be admitted to entry as goods taken from a wreck; and to verify that remark it is only necessary to refer again to the twenty-first section of the act, which, after expressly making that requirement in regard to the latter class, goes on to provide that the same proceedings shall be ordered and executed *in all cases* where a reduction of duties shall be claimed on account of damage which any goods shall have sustained during the voyage. All such importations are by that act classed with goods taken from a wreck, and are required to be appraised before they can be admitted to entry; and the twenty-first section of the act also provides that, in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges provided in the eighteenth section of the act. Recurring to the eighteenth section of the act, it will be seen that it makes provision for an appeal on the part of the merchant, and a second appraisement, and in case the merchant is still dissatisfied it is made lawful for him to refer the case to the Secretary of the Treasury. But, whenever the case is so referred, the Secretary of the Treasury is authorized and empowered to decide thereon, or to require further testimony in the case in such manner as he may deem proper, and to order the goods to be entered accordingly.

Appraisement is to be made, in the first place, by the appraisers appointed under the sixteenth section of the act; but in case the merchant is dissatisfied with their report, he may employ, at his own expense, two respectable resident merchants, who, with the government appraisers, shall examine and inspect the goods in question; and after such examination and inspection they are required to report the value thereof, if they agree therein, and if not, the circumstances of their disagreement to the collector. Where the appraisers disagree, the practice is for the collector to decide the matter in difference by adopting one or the other valu-

ation, as he may deem just, unless the merchant elects to refer the case to the Secretary of the Treasury ; but if he does so elect, the decision of the department is final and conclusive, and the entry must conform to their decision. *Belcher et al. v. Linn*, 24 How. 522 ; *Rankin v. Hoyt*, 4 How. 327 ; *Stairs v. Peaslee*, 18 How. 524. Entry of the goods must be made before the duties can be assessed, but it cannot be made during the pendency of any of these proceedings, because it must be founded on the report of the appraisers, if they agree, or if not, on the decision of the collector, or of the Secretary of the Treasury. Undoubtedly some of the regulations prescribed in the act under consideration are repugnant to the provisions of the fifty-second section of the act of the 2d of March, 1799, so far as the latter have respect to goods damaged during the voyage, and to that extent the provisions of the last-mentioned act must be considered as modified or repealed. None of the provisions of the act of the 1st of March, 1823, however, have any respect to merchandise of which entry has been made incomplete, either for the want of the original invoice or for any other cause, but in respect to all such importations and entries the proceedings must still conform to the antecedent law upon that subject. Whenever a vessel arrives from a foreign port having merchandise on board which is subject to duty, it is incumbent on the master in every case to present his manifest, and notify the collector of the arrival of the vessel ; and when that is done, and the owner, importer, consignee, or agent has presented a true invoice of the goods to the collector, he may then demand, if the goods have received damage in the course of the voyage, that the same shall be appraised in the manner prescribed in the regulations contained in the act of the 1st of March, 1823 ; and if he acquiesces in the report of the appraisers, and does not refer the case to the Secretary of the Treasury, he may claim, as matter of right, to have the deduction made as prescribed in the fifty-second section of the act of the 2d of March, 1799. Although the goods were damaged in the course of the voyage, yet the importer is not obliged to demand that the same shall be appraised. He may, nevertheless, make entry of the goods in the usual way as sound

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articles ; but in that event the collector has no authority to assess the duties upon an amount less than the invoice value. That rule for the assessment of duties was first prescribed in the act of the 20th of April, 1818, and it has been continued to the present time. 3 Stat. at Large, p. 433 ; 9 Stat. at Large, p. 213 ; 11 Stat. at Large, p. 199.

It is insisted by the defendant that this provision in the act of the 30th of July, 1846, operates as a repeal of the fifty-second section of the act of the 2d of March, 1799 ; but it is obvious that the proposition cannot be sustained.

Looking at the practical operation of the revenue system, it is clear that the two provisions have no necessary connection the one with the other, because they respectively relate to proceedings altogether different. Duties are assessed upon goods entered at the custom-house according to the invoice valuation and the value given in the entry, unless the goods are marked up by the local appraisers. Additions are often made by the local appraisers to the invoice valuation ; and in that event the law allows the merchant an appeal to merchant appraisers, whose decision, by the act of the 3d of March, 1851, is declared to be final. But the act of the 3d of March, 1857, re-enacts the proviso contained in the eighth section of the act of the 30th of July, 1846, and extends the limitation to the entered value of the importation, so that under no circumstances can the duty be assessed upon an amount less than the invoice or entered value. On the other hand, goods damaged in the course of the voyage are to be appraised before entry at the custom-house, under the regulations contained in the act of the 1st of March, 1823, and then the entry must conform to that appraisement. Entry in the one case is founded upon the invoice, with such additions thereto as the merchant may see fit to make in order to bring up the valuation to the actual market value, and in the other upon the report of the appraisers. Under the first proceeding, the duties cannot be assessed upon an amount less than the invoice valuation ; but under the latter proceeding, the duties must be calculated and assessed according to the report of the appraisers, wholly irrespective of the valuation given in the invoice. Applying these

rules of law to the present case, it is obvious that the instructions of the Secretary of the Treasury to the collector were correct, and that the claim of the plaintiffs cannot be sustained. They did not cause the goods to be appraised under the law applicable to goods damaged in the course of the voyage, and no such appraisement has ever been made; but, instead thereof, they entered the goods at the custom-house according to the invoice valuation, took out a damage warrant, caused the amount of damage to the goods to be appraised and ascertained, and then claimed to have the amount deducted from the invoice and entered value. Referring to the acts of Congress already cited, it is clear that the request of the plaintiffs could not be granted either by the collector or by the department without violating a positive law; and it is no answer to this objection to say that the invoice valuation was the full value of the article in a sound state, because that admission does not give any different character to the proceeding on which the instructions of the Secretary of the Treasury were based. Protest was made upon the proceedings as they actually took place, and it does not vary the rights of the parties now to admit that the molasses was entered at the full value of sweet molasses.

That admission cannot change the fact that the goods were entered at the custom-house before any appraisement was made according to law, or that the duties were exacted and paid on the invoice valuation; and if not, then clearly the duties could not lawfully be assessed upon any less amount. Several other questions were discussed at the bar which it is not necessary to decide at the present time, as the point ruled will dispose of the case. According to the agreement of the parties, a verdict must be taken for the defendant.

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**SALMON FALLS MANUFACTURING CO., Libellants and Appellants,
v. BARK TANGIER, CHARLES RICHARDSON *et al.*, Claimants.**

When a carrier by water, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel, and of his readiness to deliver the cargo, unloads the same on a suitable wharf at a suitable time, and makes it ready for delivery, as by separating each consignment from the others, and placing them where they are conveniently accessible for the purpose of removal, such acts, if performed in good faith, have the effect to discharge the carrier from further liability as carrier, and entitle him to freight.

Notice of the arrival of the vessel, and readiness to deliver, need not be delayed till the cargo is unloaded and all the acts performed which are requisite to discharge the carrier; it is more usual to give the notice when discharging is commenced; and when so given, it is not in general necessary that it should be repeated, if unloading is prosecuted without unnecessary or unusual delay.

When no notice is given to the consignee until the cargo is discharged, it seems the responsibility of the carrier continues until a reasonable time in which to remove the goods, has elapsed; but such is certainly not the rule where notice is given prior to the unloading.

If the unloading be temporarily interrupted by the crowded state of the wharf, on account of other consignees not removing their goods, no new notice need be given on resumption of the work.

Where prior notice is given, it is the duty of the consignee and carrier to co-operate, and the one who fails so to do must abide the consequences.

THIS was an appeal in admiralty in a case of contract. It appeared from the testimony, that, on the 3d of March, 1856, the Tangier took on board as part of her cargo of cotton one hundred bales, consigned to John Aiken, treasurer of the libellants, and sailed for Boston. She arrived April 6th. The next day, at the request of the principal consignee, she hauled up to Lewis Wharf, and the master gave to the principal consignees the usual notice of arrival and readiness to deliver cargo. The agent of the libellants, on receipt of this notice, instructed the truckman who usually did such work for them to take their cotton from the wharf and deliver it to the railroad company, to be carried to their mills, and furnished him with receipts to be signed by the agent of the railroad company, as the cotton came into their hands. On the 7th, the master began to discharge the cotton upon the wharf, causing the lots of the several consignees to be separated and so placed as to be easily accessible. This unloading continued till one o'clock on the 8th, when the wharf became

so crowded that the work had to be suspended. At that time thirty-seven bales of the libellants' cotton had been discharged, and thirty-five bales had been received by their truckman. On the morning of the 9th the truckman of the libellants went to the wharf, and, finding none of libellants' cotton, did not return on that day, or on the 10th, which was Fast-day. The wharf having been sufficiently cleared on the morning of the 10th for the master of the vessel to resume work, he accordingly proceeded with the unloading, without giving any new notice of the time of recommencing to unlade. At one o'clock P. M. of that day the remainder of the cargo, including the sixty-five bales of the libellants, was on the wharf, properly sorted, and so placed that each consignee's portion was easily accessible. At two o'clock an accidental fire consumed all the cotton on the wharf.

In the District Court a decree was entered dismissing the libel, whereupon the libellants appealed to the Circuit Court.

C. B. Goodrich, for appellants.

As the claimants rely upon a constructive delivery, the burden of proof is on them to show it. To do this they must show that an actual delivery was prevented by some neglect or default of the party entitled to receive the goods. *Parsons Mer. Law*, 202. An unlading and putting of the cotton on a wharf at a proper time and place is not *eo instanti* a delivery to the consignee; he is entitled to a reasonable time to examine and to receive his goods. *Flanders on Ship*. §§ 276, 279; *Syeds v. Hay*, 4 T. R. 260; *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314; *Bourne v. Gatcliffe*, 3 Man. & G. 687; *Gould v. Chapin*, 10 Barb. (S. C.) 613; *Clendaniel v. Tuckerman*, 17 Barb. 189; *Brittan v. Barnaby*, 21 How. 529.

The inability and neglect of the master to deliver on the 8th, and again on the 9th, was a refusal to deliver. Notice of intention to deliver is of no avail, unless followed by an actual readiness to deliver at the time appointed. After delivery had been stopped, a readiness to resume delivery is unavailing, without a new notice. 1 Leigh, N. P. 515; *The Grafton*, 1 Blatch. 173; *Stevens v. B. & M. R. R.*, 1 Gray, 277; *Bradstreet v. Baldwin*, 11 Mass. 232; *Dobson et als. v. Droop*, 1 Mood. & Malk. 441; *Abb. on Ship*. 421.

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One o'clock P. M. was the dinner-hour of the truckmen employed to move the goods. An unloading of the goods at that hour, without notice, and after an inability and refusal on two prior days, was not a delivery. The destruction by fire does not discharge the carrier, for the fire was not on board the vessel, and the bill of lading contains no exception on account of fire. 9 Stat. at Large, 635; *Morewood v. Pollok*, 18 Eng. L. & Eq. 341; *Atkinson v. Ritchie*, 10 East, 533.

Shepley and Dana, for claimants.

The unloading of goods on a suitable wharf at a usual time for unloading after reasonable notice to the consignee, accompanied with a readiness and present ability to deliver, is such a tender of delivery as discharges the ship-owner from his liability as a carrier. *Norway Co. v. Boston & Maine R. R. Co.*, 1 Gray, 271; *Cope v. Cordova*, 1 Rawle, 203; *Hyde v. T. M. Nav. Co.*, 5 T. R. 389; *Gould et als. v. Chapin et al.*, 10 Barb. (S. C.) 613; *Fisk v. Newton*, 1 Denio, 45; Angell on Car. § 313.

This rule of law is founded on the excellent reason that the liability of the carrier ceases when and where the duty to carry ceases, and the ship-owner never carries beyond the wharf. The only question, then, is the question of fact, — Was there a landing on the wharf, usual or assented to, of the libellants' cotton, separately or accessibly placed, under notice, before it was burned? The evidence places the answer to this question beyond dispute.

As for the new notice, which it is said ought to have been given on resumption of work, on the 10th, no authority can be cited which requires it, and no custom which demands it. The last objection, that the time when the unloading was finished was the dinner-hour of the truckmen, can apply only to the few bales last unloaded, if to any. In fact, this cargo was discharged in the daytime at the usual hours, and this is sufficient.

CLIFFORD, J. Beyond question, the decision of the Supreme Court in *Richardson et al. v. Goddard et al.*, 23 How. 28, has established the rule that a vessel lying in an American port, if she has commenced to discharge her cargo prior to the occurrence of the annual Fast of the State in whose port she is at the

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time moored, may properly continue the work on that day, or in case the work of discharging the vessel had been suspended because the wharf was temporarily blocked up by the merchandise previously unladen, she may, if the obstacles are removed, resume and complete the work on that day as an ordinary working-day. Assuming that the day when the unlading was completed must now be considered, under the circumstances of this case, as an ordinary working-day, the counsel of the respondents insists that the evidence disclosed in the record fully establishes their defence. That proposition is denied by the libellants, and they insist that the present case is distinguishable from that decided by the Supreme Court in two particulars. First, they contend that there should have been a new notice to them prior to the resumption of the unlading on Fast-day, after it had been suspended by reason of the blocking up of the wharf, and that no such new notice was given. Second, it is insisted by the libellants, that as the work of unlading was not completed until one o'clock, and, as that was the usual dinner-hour of the truckmen, the unlading was not at a proper time so as to discharge the carrier from further liability, even if the notice was sufficient, and although all the other acts to constitute a legal substitute for an actual delivery were duly performed.

That due notice was given of the arrival of the bark, and that the master was ready to deliver the consignment, has already appeared, and the evidence upon that point need not be repeated. No authority is cited to show that a second notice is ever required in a case like the present, and it is believed that none can be found to countenance such a requirement, where it appears, as in this case, that all of the officers of the vessel remained on board, and that the suspension of the work was only a temporary one, occasioned by the ordinary impediments and obstructions universally known to be incident to the nature of the business. Small wharves are liable to become blocked up upon the discharge of large cargoes, and when that is the case the obstruction itself furnishes to the experienced truckman or drayman the reason for the suspension of the work. Had the master truckman of the libellants gone to the wharf on Wednesday and found the

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vessel abandoned by her officers, and no one on the wharf engaged in removing the cotton, there would be much greater reason to support the views of the libellants; but it was not so. When the teamster went there, all of the officers were on board, and the truckmen of the delinquent consignees were employed in removing the cotton from the wharf, and some two hundred bales were removed during that day. Under these circumstances, the teamster could hardly fail to understand that the work of unlading would be resumed as soon as the obstacles which had caused it to be suspended were removed. Besides, while he was there he was told by the mate that want of room had occasioned the work to be suspended; and not a doubt is entertained from the evidence that he well understood that it would be resumed as soon as a sufficient number of bales were taken away to afford room to discharge the residue. Carriers by water, acting under the usual bill of lading, are not required to transport their cargoes from the wharf to the storehouses of the merchant or consignee, but may lawfully unlade the same at the usual wharf; and all the decided cases, if rightly understood, admit that if the carrier, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel, and of his readiness to deliver the cargo, unlade the same on a suitable wharf, at a suitable time, and make it ready for delivery, as by separating each consignment from the others and placing it on the wharf, where it is conveniently accessible for the purposes of removal, that such acts if performed in good faith are equivalent to an actual delivery of the merchandise, and have the effect to discharge the carrier from all further liability in his capacity as carrier, and fully entitle him to the stipulated freight. Ships trading from one port to another have not the means of carrying the goods on land, and, according to the established course of trade, a delivery on a suitable wharf, at a suitable time, after due notice of the arrival of the vessel, and of the master's readiness to deliver the goods, is equivalent to such a delivery as will discharge the carrier from his liability as such, provided the consignment in question is properly separated from others, and the goods so placed on the wharf as to be conveniently accessible for the purpose of

removal. *Hyde v. The T. M. Nav. Co.*, 5 T. R. 389 ; Story on Bailm., sec. 445 ; 2 Kent's Com. (9th ed.) 816 ; *Coke v. Cordover*, 1 Rawle, 203 ; *Kohn v. Packard*, 3 La. 225 ; *Harman v. Mant.* 4 Camp. 161 ; *Gould v. Chapin*, 10 Barb. (S. C.) 612 ; Ang. on Car., sec. 313 ; *Norway Plains Co. v. The B. & M. R. R.*, 1 Gray, 271 ; *Fisk v. Newton*, 1 Denio, 45 ; *Thomas v. The B. & P. R. R. Co.*, 10 Met. 472 ; *Casside v. The T. Nav.*, 4 T. R. 581 ; *Richardson et al. v. Goddard et al.*, 23 How. Mr. Chitty says, where goods arrive by ship from a foreign country, they must be delivered by the master to the consignee or his assigns according to the bill of lading, or at the usual wharf, according to the usages of the port of delivery with respect to such a voyage. Chitt. & Temp. on Car. (ed. 1857), 154 ; *Golden v. Manning*, 3 Wils. 429 ; Same Case, 2 W. Black, 916. He cannot, however, at once discharge himself from all responsibility by immediately landing the goods, without any notice of the arrival of the vessel or of his readiness to make the delivery. But he must give such reasonable notice of those facts to the merchant or consignee as will enable him, in the usual course of business, to receive and take away the goods. Add. on Con. (2d Am. ed.) 480 ; *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314 ; *Bourne v. Gatcliffe*, Cl. & Fin. 45 ; *Price v. Powell*, 3 Comst. 326. It is a mistake, however, to suppose that such notice cannot be given till after the unloading is completed and all the acts performed which are required to discharge the carrier. On the contrary, it is more usual and equally effectual to give the notice at the time the work of discharging the vessel is commenced ; and when so given it is not in general necessary that it should be repeated, provided the unloading is prosecuted without unnecessary or unusual delay. Casual interruptions in the prosecution of the work for brief periods, by such impediments and obstructions as are necessarily incident to the nature of the business, — as by the blocking up of a small wharf by the vessel's own cargo, — are not unusual, and do not create any necessity whatever for a second notice. Such impediments are so common that they may be said to furnish their own explanations, and being such as every truckman fit to be employed readily comprehends, the interrup-

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tions in the work of lading occasioned thereby create no necessity to repeat the notice, because the interruptions are not of a character to mislead those who are usually employed to remove the goods from the wharf.

Unlivery at a proper time as well as at a proper place is a part of the duty of the carrier, and is one of the necessary acts to be performed by him in order to discharge himself from liability in a case like the present. Where no actual delivery to the consignee had been made to free himself from responsibility as a carrier, he must show that he gave due and reasonable notice of the arrival of the vessel and of his readiness to deliver the goods; that pursuant to that notice he discharged the consignment in question on a suitable wharf, at a suitable time, and that the goods were properly separated and so placed on the wharf as to be conveniently accessible for the purpose of removal. All this was done in this case, unless it be held, as is contended by the libellants, that the time was unsuitable, because the work was completed at one o'clock, which it is said is the usual dinner-hour at this port for the truckmen. Masters of vessels employed in the transportation of merchandise necessarily have to deliver goods to persons of different habits, and to those engaged in different pursuits,; and to hold that they must suspend the work of discharging their vessels during the several hours when it is usual for those to whom the goods are to be delivered to go to their meals, would be to subject them to great inconvenience and embarrassment. Such restriction upon the hours of labor would prove to be very inconvenient to those usually employed to discharge the cargo, and still more so to those belonging to the vessel. Meal-time, as usually understood by different persons in a commercial port, is exceedingly variable. Dinner-hour varies from twelve o'clock at noon to six o'clock in the afternoon, and breakfast-hour from sunrise to ten o'clock in the forenoon, or later. Take the case of a large cargo consigned to various consignees, and if indiscriminately stowed, it would be difficult to discharge it at all within the business hours of the day, without violating this supposed rule. Truckmen, it is said, usually dine in this port at one o'clock, but the case shows that some of them

dine at twelve, and, what is more, the case also shows that other persons besides regular truckmen were employed in taking away some portion of the cotton. Consignees are not obliged to employ truckmen to remove their goods from the wharf, but may go there in person if they choose, and receive their own consignments; and if the rule has any foundation in law, it is very clear that its benefits may be claimed by all who have any such dealings with the vessel. But the objections to the proposition as applied to this case do not consist alone in the uncertainty of the restriction as to the hours of labor, nor even in the fact that the rule would occasion great inconvenience and embarrassment. Still graver objections exist to it, arising from the assumed theory of law on which it is based. It assumes, in the first place, that the notice given by the master of the arrival of the vessel, and of his readiness to deliver the goods, imposed no duty upon the consignees until all the acts required of the master to discharge himself from his responsibility as a carrier had been performed; and then it also assumes, in the second place, that, after all those acts had been performed, he still continued to be the insurer of the goods for such a length of time as was reasonably necessary to enable the consignee to go to the wharf and take the cotton away. Suppose no notice had been given of the arrival of the vessel, and of the master's readiness to deliver the goods, as in the case of *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314, then the theory of law assumed by the libellants, that the mere unloading of the goods on a suitable wharf, at a suitable time, is not equivalent to an actual delivery would be correct. When the only notice given of the arrival of the vessel, and of the master's readiness to deliver the goods, is subsequent to the performance of those acts, then it may be true that the consignee is entitled to a reasonable time thereafter in which to go or send to the wharf, receive the goods, and take them away. But where he is duly notified in advance of the unloading, or at the time when it was commenced, he has no right to remain passive and indifferent until the unloading is completed, and all the other acts required of the master are fully performed, and then claim that the liability of the carrier shall continue for such an additional

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length of time as will enable him to do what he ought to have done while the cargo was being discharged and those other acts were being performed. Consignees and masters of vessels are expected to co-operate in the delivery of consignments; and if they do so, it will seldom happen that any controversy will arise, and when they do not do so, the delinquent party must abide the consequences. *The Grafton*, 1 Blatch. 173; *Brittan v. Barnaby*, 21 How. 529. Such co-operation is for the interest of both parties, and it is for that reason that it is required. Masters need the co-operation of consignees to prevent the wharf from becoming blocked up, and the interest of consignees is promoted by such co-operation, because without it some of the acts otherwise required of the master cannot be performed. A new hearing was granted in this case at the last term, so that the case now stands the same as in an ordinary appeal. For the reasons already given the decree of the District Court is affirmed.

THE AMOSKEAG MANUFACTURING COMPANY *et als.*, Libellants, v.
THE STEAM FERRY-BOAT JOHN ADAMS, PEOPLE'S FERRY COMPANY, Claimants.

Passengers cannot be regarded as lookouts in any sense known to the maritime law, certainly not unless specially designated by the master for such purpose.

When a vessel shown to have been properly moored in a proper place is run into by a steamer crossing a harbor, the burden is on the steamer to show either that she was without fault, or that the disaster was the result of fault on the part of the moored vessel.

Inevitable accident under such circumstances cannot be presumed, especially when the occurrence was in the daytime; but it must be clearly proved by the party setting it up, unless the fact appears from the testimony on the other side.

Ferry-boats, in crossing harbors of commercial ports in a fog, or in the night, should proceed with great caution.

The owners of a vessel properly moored at a wharf are not bound to keep a watch on board.

Where a leak occasioned by an injury received by a vessel moored at a wharf had damaged the cargo because the leak was not discovered for some time after the accident, but where it at the same time appeared that two examinations of the injured vessel were made subsequent to the collision, and no indications of any injury below water could be discovered, *held*, that the damage to the cargo was not the result of negligence upon the part of those in charge of the injured vessel.

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In case of a collision between a moving steamer and a vessel moored at a wharf, in which the latter was injured, it is no defence to say that the damage would have been less if the vessel had been more strongly built.

THIS was a suit in admiralty in a cause of collision. The libel was filed in the District Court on the 12th of February, 1859, but on the 17th of April, 1860, it was transferred to this court, pursuant to the act of the 3d of March, 1821, because the District judge was so concerned in interest as to render it improper for him, in his opinion, to sit in the trial of the cause.

The facts were these: On the 19th of January, 1859, the ship *Aldanah* arrived at Boston from New Orleans, with a cargo of cotton, and on the 20th was moored in the harbor of Boston, at a place called Battery Wharf. The steamer *John Adams*, in attempting to pass across the harbor from the eastern side to a slip or dock southerly of the place where the ship lay, ran into the stern of the ship, striking her stern-post, opening the wood ends of the vessel, and caused her to leak, and thereby injured a part of the cotton, the property of libellants. The *John Adams* was a ferry-boat and was at the time on her usual trip across the harbor.

The corporation respondent set up as a defence that the collision was the result of inevitable accident, and alleged that the steamer, in attempting to cross the harbor, was carried against the ship by the tide, in a dense fog, which shut down on the water when the steamer was about half-way across the harbor. They also alleged that, when the fog became too dense to proceed with safety, orders were given to slow, and finally to stop; that while thus stopping the steamer was mid-channel and exposed to a strong flood-tide which carried her from her course. After waiting for a time, and no change in the condition of the atmosphere taking place, the whistle was sounded, and, as a measure of safety to the steamer and other vessels, she was moved slowly for a brief period, then the wheels were reversed, and when in this condition the collision occurred. The respondents averred that such was the condition of the weather that no precaution on their part could have prevented a collision, even if the steamer had been moving by the tide alone.

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There was considerable testimony introduced tending to show that the ship's stern-post was not properly fastened, and that if it had been as strong as usual the ship would not have sprung aleak on account of the blow.

D. Thaxter, for the libellants, cited *New York and Virginia Steamship Co. v. Calderwood et als.*, 19 How. 241; *The Bay State*, Abb. Adm. R. 235, and 18 How. 89; *The St. Louis and The A. Rossiter*, 1 Newb. Adm. 225; *Ure v. Coffman*, 19 How. 56; *The Juliet Erskine*, 6 N. C. 633; *The Netherland Steamboat Co. v. Styles*, 40 Eng. L. & Eq. 19; 1 Parsons's Mar. Law, 201-211; *The Lochlibo*, 3 Wm. Rob. 310.

J. W. Hubbard, for claimants, cited *The Virgil*, 2 Wm. Rob. 201; *The Europa*, 2 Eng. L. & Eq. 557; *The Bolina*, 3 N. C. 208; *The Ebenezer*, 2 Wm. Rob. 206; *The Neptune*, Olcott, 483.

CLIFFORD, J. Inevitable accident is the main ground of defence assumed by the respondents. They do not controvert the fact that the collision occurred at the time and place and substantially in the manner as alleged in the libel. It took place between eight and nine o'clock in the morning of the 20th of January, 1859, while the ship was lying at the wharf. She had arrived the day previous from New Orleans, and the evidence is full to the point that she was properly moored, under the direction of the wharfinger, at a wharf where vessels of that description and all classes of vessels were accustomed to be moored. According to the testimony of the wharfinger, she was moored in the usual method at the end of what is called the middle pier of the wharf, with head-fasts and stern-fasts and with good ranging-fasts each way, and the mate testifies that she had a hawsér across the dock. Her stem, as she lay, headed northerly, and her stern was towards the ferry slip. Two barks were moored at the pier next south of the ship and between her and the slip where the steamer was accustomed to land. One was outside of the other, and the jib-boom of the outer bark was partly over the stern of the ship, extending inside of the centre. Her boat was suspended by tackles on a level with the jib-boom, and the force of the collision was such that it was stove and broken in two pieces, so that one half was left hanging from one

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tackle, and the other half from the other. As described by the wharfinger, the pier at which the ship was moored projects some fifteen or twenty feet beyond where the two barks lay. Its width is about one hundred and thirty feet, and it is about the same distance from the southerly corner of the southerly pier to the ferry slip. When the collision occurred the ship was lying in a line with the cap-sill of the wharf, and extended some fifteen or twenty feet beyond the corner of the pier to which she was fastened. She registered ten hundred and forty-seven tons, and was one hundred and seventy-three feet long. Ships of all sizes have been moored at that wharf for a period of fifteen or twenty years, without any accident having occurred, and the wharfinger says he considers it one of the safest berths in the harbor. At the time the collision occurred the mate of the ship was standing on her port rail, and the blow was so severe that he was knocked off the rail by the concussion. Both the master and the mate lived on board, but the former was temporarily absent at the time of the disaster. He returned, however, before the steamer left the stream, and immediately examined the ship to ascertain what damage had been done. Her bulwarks on the starboard side, about six feet from the stern, were stove for the distance of eight feet, exhibiting the appearance as if the timbers striking the vessel had hit her endwise. Pieces of wood from the steamer were left sticking in the broken parts of the bulwarks of the ship. The bulwarks were constructed of white-pine, and were ceiled inside with three-inch hard-pine planks. One of the hard-pine planks was broken, and so also was one of the wheel-ropes. It was a two and a quarter inch rope not lashed at all, and was broken near the middle. Damage was also done to the rudder, which was made of oak. Abreast the twenty-two foot mark it had a large scar on the starboard corner of the after part, an inch deep, and one or more of the braces also were started. It was not far from eight o'clock in the morning when the steamer started from her slip on the eastern side. As alleged in the answer she was a ferry-boat, and had on board two teams and some fifty passengers to be transported across the harbor to the main part of the city. Prior to her starting there was considerable

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fog on the western side of the stream, but, as it did not rest on the water, by six or eight feet, the hulls of vessels and other objects on the opposite side were plainly visible. Under these circumstances, the master of the steamer thought it prudent to make the trip without consulting the superintendent. He accordingly gave the order to start, and when the steamer had proceeded about one quarter of the way across, the fog shut down, first on the western and then on the eastern side, and became so very dense, as the master says, that he lost the sight of both shores. Orders were then given to slow, and the steamer proceeded as slow, according to the testimony of the engineer, as she could be worked under steam and have her wheels pass their centres. When about half-way across, the master says he gave the signal to stop, and then to reverse the wheels, and the orders were obeyed so as to stop the boat. That course was adopted in the hope that there would be a change in the weather, and with a view to ascertain the true position of the steamer. For that purpose the steamer remained stationary some three or four minutes, but, finding that the weather was not improving, the master directed her to be started again under a slow bell; but after the engine had made some three or four revolutions, the signal was again given by the master to stop. He then stepped two or three feet to the forward part of the pilot-house to ascertain whether he could see any object that would enable him to determine where he was, but could not; and accordingly gave the signal to reverse. At that moment the passengers began to move from the forward to the after part of the boat, and before there was time for the engine to make one revolution under his last order the collision occurred. During all this time the master was in the pilot-house at an elevation of twenty-eight feet above the water-line of the vessel, and he admits that he could not see the water at all, and that he could only see the "glimmer" of men standing on the forward part of the steamer. Her whole company consisted of five men, to wit, the master, one engineer, one fireman, and two deck hands. One of the deck hands was stationed forward, but the other was aft, and the master says the former was at his post and was the lookout for the steamer. But it does

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not appear that the master made any inquiries of him during the passage, or that the lookout made any communication to the master or any other person in charge of the vessel. Many of the passengers; as is usual in such cases, were standing on the forward part of the deck, and it is insisted by the respondents that they were looking out, and that their testimony shows that every reasonable precaution was taken to avoid a collision. Much conflict exists in the testimony, especially as to the distance that objects could be seen during the last half of the passage, and as to the speed of the steamer at the time of the disaster. Several witnesses examined by the respondents express the opinion that the ship could not be seen at the distance of more than ten or twelve feet as the steamer approached the western shore. On the other hand, about an equal number examined by the libellants testify that she could be seen at the distance of from one to two hundred feet. John F. Randall, the mate of the outer bark, says he saw the steamer come in collision with the ship while he was walking fore and aft on the quarter-deck of the bark, and he says when he first saw her she was from one hundred to one hundred and twenty feet from the place where he was standing. She was seen also as she approached by one of the stevedores on board the ship. At first he thought she was making her right course for the slip, which proved to be a mistake. He is unable to state the distance, but says she seemed to be far enough off to make her right course to the dock. When the master of the ship returned, the steamer was still in the stream, and he says he saw her when she was two hundred feet distant from the place of collision. His statement is substantially confirmed by the mate, who says he could see her at a distance of a hundred and fifty feet; and the carpenter of the ship testifies that the fog was not so dense at any time but that he could see the length of the ship, and he affirms that he saw the steamer at the time she was backing out when she was a hundred feet distant, and then turned away and went aft. One witness of experience also, who was on board the steamer, confirms these statements. He says he saw the ship as they approached when she was one hundred and forty feet distant, and that he hailed the steersman of the boat as soon

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as he saw her. To the same effect also is the testimony of the principal stevedore who was on board the ship engaged in discharging cargo. He says he could see as far as fifty yards, though he admits it was foggy. Opposed to these statements is the testimony of the master of the steamer, the deck-hand who was forward, and some five or six of the passengers, who express the opinion that objects could not be seen at a greater distance than from ten to twenty feet. One theory may be suggested which perhaps may reconcile the testimony of the witnesses. Those examined by the respondents did not see the ship until they were close to her, and consequently they are of the opinion that she could not have been seen at any greater distance. On the other hand, the witnesses for the libellants saw her at the respective distances mentioned in their testimony, and therefore they know that she could be seen at that distance; or, in other words, one class of the witnesses speak from knowledge, while the other class but give their opinions. At all events, I am of the opinion, after a careful review of the evidence, that the density of the fog was not such that the collision might not have been prevented if the lookout of the steamer had performed his duty. Very little reliance can be placed upon a crowd of passengers as a substitute for a competent lookout in such an emergency. They are generally eager to reach the opposite shore, and oftentimes by their unreasonable complaints induce those in charge of the vessel to adopt rash and dangerous experiments. Passengers, in point of fact, cannot be regarded as lookouts in any sense known to the maritime law, certainly not unless they are specially designated by the master for that purpose. Lookouts are usually and properly selected from the persons belonging to the vessel, and they must be persons of suitable experience, and continue constantly subject to the command of the master. Every steamboat travelling in the thoroughfares of commerce ought to have a trustworthy and constant lookout besides the wheelsman, for the reason that it is impossible for him to steer the vessel and keep the proper watch, especially when his position is so elevated that either fog or mist may prevent him from seeing the water. *The Genessee Chief*, 12 How. 463. Steamers thus navigating must

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have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. *Chamberlain et al. v. Ward et al.*, 21 How. 570. According to his own statement, the lookout in this case did not see the ship until the steamer was within five or six feet of her. He says he was standing on the bow of the boat some ten feet from the edge, and seven or eight feet inside of the chain, and he affirms that he was carefully attending to his duty. But the statement is incredible, if he was competent for the place. Whether his failure to perform the duty required of a lookout arose from his incompetency or from inattention is wholly immaterial in the present inquiry, as in either event the owners of the steamer are responsible for the consequences. Looking at the whole evidence, there is much reason also to conclude that the master was less cautious than he ought to have been in the emergency in which he was placed. From his own testimony it is quite obvious that he had lost the bearings of the steamer on the western side, and was in great uncertainty as to his real position. Assume that what he states is true, that he could not discern objects on the deck, or see the water at all, and then it follows that he had no means of knowing whether the lookout was attending to his duty or whether he was at his post. After he had stopped his boat in the first instance, he spoke to the engineer, and remarked that he could not see anything, and was going ahead under a slow bell. His second order to stop was too late, and the order to back on that occasion was not given till the moment when the passengers began to run from the bow of the boat. Some of them had then seen the ship, and one of them had hailed the steersman of the steamer. All of these occurrences must have taken place in the presence and hearing of the lookout, if he was at his post, and yet there was no hail from him, and he now affirms that he did not see the ship until the steamer was "just about striking her." Taking his own account of the transaction, it is impossible to resist the conclusion that he was incompetent for the place or inattentive to his duty. Having come to this conclusion, one or two remarks as to the

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speed of the steamer will be sufficient. On this point also there is much conflict in the testimony. Several witnesses called by the respondents testify that she was not going faster than at the rate of a mile an hour, and the engineer affirms that she was moving as slow as she could under steam. But several very competent witnesses examined by the libellants express the opinion that her speed was at the rate of four knots per hour, and the circumstances attending the disaster go very far to confirm their statements. She first hit the ship, staving her bulwarks, scarring the rudder, and breaking one of the wheel-ropes, and then passed to the bark, lying partly inside of the ship, and stove her boat, cutting it in two pieces. Had her speed been reduced to the rate of a mile an hour, it is scarcely possible that such consequences would have flowed from the collision.

Without entering more into detail, I am of the opinion that the steamer cannot be excused upon the ground of inevitable accident, and the evidence falls so far short of establishing that defence, that it is hardly necessary to enter into any extended consideration of the law upon that subject. Inevitable accident, in the absolute and strict sense of the term, says Dr. Lushington, in the case of *The Europa*, 2 Eng. L. & Eq. 559, very seldom takes place. According to his view, the word "inevitable" must be considered as a relative term, and must be construed, not absolutely, but reasonably, with regard to the circumstances of each particular case. In a case where there was no evidence to establish a *prima facie* presumption of negligence or want of seamanship, and the party proceeded against had alleged inevitable accident, he held that the burden was not on the respondent to prove it, but that the party seeking indemnification must prove that the other party was to blame. *The Bolina*, 3 N. C. 208. That question, however, came up again in the case of *The Lochlibo*, 3 Wm. Rob. 318, before the same learned judge. On this last occasion, after defining the term "inevitable accident" as meaning a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the accident, he held it to be clear that *prima facie* the *onus probandi* was on the

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owners of the moving vessel, and that they were bound to establish by credible evidence that their vessel was not to blame at all, or that the blame rested solely with the pilot who was on board, in which case the owners would be exonerated from all responsibility. It was held by the Supreme Court, in the case of *The New York and Virginia Steamship Company v. Calderwood et al.*, 19 How. 246, that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing-vessel, nor the fact that the steamer was well manned and furnished and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing-vessel where the barge or sailing-vessel is at anchor, or sailing in a thoroughfare out of the usual track of the steamer. Mr. Parsons lays down the rule, that if a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. 1 Par. Mar. Law, 201. If a vessel anchor in an improper place, she must take the consequences that fairly result from her own improper act. *Strout et al. v. Foster et al.*, 1 How. 89; *The Scioto*, Davies, 359. But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be reasonably practicable and consistent with her own safety. *Knowlton v. Sanford*, 32 Me. 148; *The Batavier*, 40 Eng. L. & Eq. 25. All the evidence in this case shows that the ship was moored in a proper place, and that she was as helpless in her condition at the time of the accident as the wharf to which she was fastened. Beyond question it is incumbent upon the libellants to show that their vessel was in a proper place, and that the collision occurred; but after those facts are shown, I hold that the burden of proof is upon the respondents, either to show that their vessel was without fault, or that the disaster was the result of fault on the part of the complaining party. Inevitable accident, under such circumstances, cannot be presumed, especially when the occurrence was in the daytime, but must be clearly proved by the party setting up that defence, unless the fact appears from the evidence introduced by the libellants to make out their case. Ferry-boats in crossing the

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harbor of a commercial port, either in a dense fog in the day-time or in the darkness of the night, ought to proceed with great circumspection and caution ; and when those in charge of them have lost the bearings of the vessel, and do not know that the way is clear, they should stop, and if necessary come to anchor, and if, contrary to these suggestions, they rashly advance, the owners must stand the consequences ; as in that state of the case the mere excuse that they could not see or did not know where they were will afford no justification for a collision. Three or four knots an hour was too fast under the circumstances of this case, especially if it be assumed that the fog was so dense that a large ship moored at the wharf could not be seen at the distance of more than ten or twenty feet. Vessels in motion for the purpose of crossing a narrow channel dividing a commercial port are under the strongest obligations to keep out of the way of those properly moored at the wharves ; and if in any given case they cannot accomplish that duty in any other way than by returning temporarily to the position from which they started, and that expedient is safe and reasonably practicable, they are bound so to do in order to prevent a collision.' Dr. Lushington said, in the case of *The Juliet Erskine*, 6 N. C. 633, that he was not competent to say what was a proper quantity of sail, in the case before him, or what was not ; but he was competent to form the opinion that if, on a dark night, the vessel was proceeding at such a rate that those on her deck had not sufficient command over her so as to avoid all reasonable chance of accident, then that was too expeditious a rate, because it is the duty of those who navigate the commercial marine of the country to take care that they do not, for the sake of expedition, injure the property of other people. That principle was again affirmed in the case of *The Batavier*, 40 Eng. L. & Eq. 25. Sir John Patteson said in that case that at whatever rate the steamer was going, if going at such a rate as made it dangerous to any craft which she ought to have seen and might have seen, she had no right to go at that rate. At all events, she was bound to stop if it was necessary to do so, in order to prevent damage being done to the craft in the river. No doubt the passengers in this

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case were impatient at the delay, but it is a mistake to suppose that the steamer was compelled to advance at the hazard of a collision. She had stopped once for three or four minutes, and might have stopped again without difficulty, or if it had been absolutely necessary she might have returned to the slip on the eastern side.

It is insisted by the respondents, in the second place, that the ship under the circumstances should have kept a watch, and that those in charge of her were in fault in not giving a signal to warn the steamer of her danger as she approached where the ship lay. No authority is cited in support of the proposition, and it is believed that none can be found where a vessel properly moored at a wharf, out of the usual track of a colliding steamer, has been held to be in fault because she failed to give a signal in the daytime to warn off the steamer as she approached. Some attempt was made to prove that the usage of the port required it, but every witness who was examined upon the subject denied all knowledge of any such usage. Owners frequently find it necessary to moor their vessels at the wharf for a considerable time when the vessel is waiting for employment, or when she is the subject of legal controversy, and to require the owners to keep a watch when the vessel is thus unemployed would be to expose them to an unnecessary and useless expense. Those in charge of the ship in this case knew that she was entirely out of the usual track of the steamer, and had no more reason to expect that the steamer would collide with their vessel until it was too late to give any signal, than the proprietors of the wharf had that the steamer would run against the pier to which the ship was fastened. She had her usual highway before her free and unobstructed, and it was her duty to keep in it, or at least to keep out of the way of vessels properly moored at the wharf; and clearly she had no right to complain that a ship lying entirely out of her pathway did not keep a watch to admonish those in charge of her to perform their obligations. Unnecessary burdens or useless restrictions are not imposed by the rules of the maritime law. Such rules are founded in reason, and only require parties so to conduct themselves in the enjoyment of their

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own rights as not to injure the rights of other persons. Absence of a light from a barge or sailing-vessel in the night-time will not in general excuse a steamer from coming in collision with such barge or sailing-vessel, if the latter is at anchor out of the usual track of the steam-vessel; and if not, it is difficult to see any reason why a vessel properly moored at a wharf where she does not in any respect encumber the pathway of commerce, or in any manner impede, obstruct, or hinder the passage of other vessels, should be required in the daytime to keep a watch. Such a requirement as the one involved in the proposition would impose an unnecessary burden on the owners of vessels, and in the absence of any proof of usage in the port, or of any decided case to support the proposition, it must be overruled.

In the third place, it is insisted by the respondents that the master of the ship was guilty of gross negligence in not sounding her pumps immediately after the collision, and in not discovering the leak at an earlier moment. It is admitted by the libellants that the leak was not discovered until the next morning after the collision, and they do not controvert the fact that the vessel at that time had made ten feet of water, or that she was then drawing three feet more than she drew the day previous. But they deny that there was any negligence on the part of those in charge of the ship in not making the discovery earlier. She was a tight ship, and had always been so since she was built. According to the testimony of the mate, the pumps suck at fifteen or sixteen inches, and they had been sounded about a half an hour before the collision, when she had eleven inches of water. They were also sounded the day previous, when she had but nine inches of water; and two days before the collision she had but seven inches of water, and those in charge of her testify that, on the voyage from which she had just returned, she had made less water than is usual even for well-built ships. Most of the witnesses agree that it is not usual to sound the pumps more than once in twenty-four hours, while the ship is lying at the wharf discharging cargo, and some of them say that they seldom think of sounding them at all under such circumstances. Examination of the vessel was made by the master immediately after his re-

turn, and before the steamer reached her slip. All the injuries that could be discovered indicated that the entire damage was above water. They were such as have already been described, but the pitch in her wood-end seams above water was not cracked. In the course of the forenoon she was also examined by two experienced ship-carpenters, who were sent by the respondents for the purpose of repairing the damage done by the collision. No directions were given by them to have the pumps tried, and one of them assigns as the reason that he never thought of the thing, as he should not have supposed it possible that such a blow would have caused the vessel to leak. Witnesses called by the respondents express the opinion that the pumps should have been tried immediately, but wisdom after the fact is entitled to much less respect than that which precedes the necessity for its exercise. All can now see that it would have been wise to have tried the pumps; but inasmuch as all the injuries were apparently above water, and the pumps had just been sounded, it is not probable that many, if any, shipmasters would have thought of it at the time. On the morning after the collision, while the master was standing on the wharf, a pilot inquired of him whether the ship was not deeper in the water than she was when she arrived. At first he thought not, and wellnigh convinced the pilot that he was in error; but upon looking at the water-mark on the rudder, he found that she was three feet deeper in the water than she was on the morning previous. Whereupon he gave orders to sound the pumps, and ascertained for the first time that she had made ten feet of water. Four pumps were employed during the day, and two were kept going until eleven o'clock at night, and men were hired to watch and tend the pumps until the cargo was discharged. Five days after the collision the leak was discovered by the carpenter. It proved to be an opening in the wood-ends of the vessel, between the thirteen and fourteen foot mark, and was occasioned by the stern-post being started. Repeated efforts were made in the mean time to discover the leak, but without success. In view of all the circumstances, I am of the opinion that the charge of negligence is not sustained.

Lastly, it is insisted by the respondents in substance and effect

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that the blow given by the collision would not have started the stern-post of the vessel, and opened the seams of her wood-ends so as to have caused her to leak, if she had been well built and her stern-post had been properly secured and fastened, and sufficiently calked and pitched below low-water mark. Two questions are presented by the proposition, — one of fact and the other of law. It assumes as matter of fact that the ship was not well built, and that her stern-post was not properly secured and fastened. Whether the theory assumed be true or not is a question of fact to be determined from the evidence. She had performed her voyage without any difficulty, and to the satisfaction of all the parties concerned, and was then lying moored at the wharf with a full cargo on board of undamaged merchandise, and to all appearance was in a sound and sea-worthy condition. Every presumption, therefore, on this branch of the case, is in favor of the libellants, and clearly it is incumbent on the respondents to prove the theory of fact on which the proposition rests. Much testimony was introduced on this point by both sides, and it is no more than just to say that it is very conflicting. Looking at the whole evidence, however, in connection with the circumstances of the case, it is the better opinion that the theory assumed by the respondents is not well founded. But suppose it to be admitted that the ship was not in sufficient repair to render her sea-worthy for a new voyage, still there is not a word of proof in the case to show that she was not sufficiently staunch and strong to fulfil all the unfinished purposes connected with the voyage from which she had just returned. On the contrary, the evidence is full to the point that she did not leak, and was in all respects sufficiently sea-worthy to have enabled those in charge of her to have discharged her cargo without damage, and to have delivered the cotton pursuant to the contract of affreightment. For the argument's sake, therefore, let it be conceded that her condition was such as is here described ; that is, that she was not sufficiently staunch or was too much out of repair for a new voyage, but that she was amply sufficient to have enabled her master to have discharged the cargo without damage and to have performed his contract. That view of the facts is certainly as favorable to

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the respondents, to say the least of it, as the evidence will sustain. Assuming the facts to be as already found, I am of the opinion that the defence set up by the respondents cannot be sustained, and that they are just as clearly liable on that state of the case to the extent of the damage done as they would have been if the ship had been staunch, in good repair, and in all respects seaworthy for a new voyage. They cannot defend themselves in this case against the wrong done by the collision, upon the ground that the blow would have been harmless if the vessel had been stronger, provided she was sufficient to enable her officers to discharge the cargo without damage, any more than a person accused of wilful homicide could successfully set up that the deceased would have recovered if he had not been in feeble health at the time the blow was inflicted. Extreme cases may be imagined, as if the injured vessel was actually sinking at the time of the collision, or was on fire and enveloped in flames, when possibly a different rule would apply; but if reasonably considered, the vessel was sufficient to accomplish the remaining purposes of the voyage, and was not certainly in a condition of inevitable destruction from natural causes, then it is clear that such a defence cannot prevail, and that is all that it is necessary to decide in this case. Whether such a defence could be admitted under any or different circumstances is not a question at the present time. It is no defence to a suit for damages caused by a collision, says Parsons, that no loss would have been sustained if the injured vessel had been stronger; and it was held by the Supreme Court of Kentucky that the fact that the plaintiff's boat was a weak one, afforded no protection to the defendant, if the collision happened through his carelessness. 1 Parsons, Mar. Law, 211; *Inman v. Funk*, 7 B. Mon. 538. Upon the whole case, I am of the opinion, that the libellants are entitled to recover, and there must be a decree accordingly. Should any dispute arise in determining the amount of the damage, the cause must be referred to a commissioner to make the estimate.

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**JOSHUA BAKER *et als.*, Libellants, *v.* DANIEL DRAPER *et al.*,
Respondents.**

At common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was so given.

In this case the transaction must be governed by the rules of law which prevail where it took place; and in Massachusetts, where a party, bound to a simple contract debt, gives his own negotiable security for it, it is presumed as a matter of fact, in the absence of any circumstances to indicate a contrary intention, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt.

Such rule should be cautiously applied in all cases where the remedy upon the new security is not as good and effectual as upon the one for which it was substituted.

If there is any deception or fraud in the giving the new security, or if it was accepted without full knowledge of the facts, the plaintiff is not bound by the acceptance, but may tender it back or produce it in court to be cancelled, and seek his remedy on the original contract.

Where the libellants, in Massachusetts, took a note for the amount of certain supplies furnished to a vessel, from a person whom they supposed to be one of the owners, but which person had previously given a bill of sale of his share in the vessel to certain third parties, to secure them for liabilities they had incurred for him, which was not at the time known to the libellants, *held*, that the libellants did not take the note in satisfaction and in discharge of the original liability of those to whom the credit was given, or with full knowledge of all the material facts.

THIS was an appeal in admiralty in a suit *in personam*, brought against the respondents as owners of the bark Fernandina, to recover for certain supplies alleged to have been furnished by the libellants to the bark on the credit of the vessel and owners. Respondents admitted the ownership of one half of the vessel, and that they held the other half as security for certain advances made to, and liabilities contracted for, one Adolphus Davis, but denied that the credit was given on their account or that of the bark. They alleged that the supplies were furnished on the credit of the said Adolphus Davis, who was the ship's husband, and that he had subsequently paid for the same as follows, viz. by his promissory note for six hundred and eighty-six dollars and eighty-three cents, dated August 17, 1858, and payable in seven months from date. The libellants in a supplemental bill denied that the credit was given to Davis otherwise than as he was supposed to be one of the owners in the vessel. They

also denied receiving the note as payment, and averred that, if such was the intent of the maker, then the transaction was fraudulent, because it was founded on a fraudulent concealment of material facts touching the ownership of the vessel, and that it had the effect to deceive and mislead the libellants.

The note was brought into court and tendered to the respondents. Certain interrogatories were propounded in the supplemental libel, which were answered by respondents. A decree was entered in the District Court in favor of the libellants.

H. A. Scudder, for libellants, cited *Story on Partnership*, § 455; *Parsons*, Mar. Law, 91; *The Bark Chusan*, 2 Story, 469. As to the law in Massachusetts, *French v. Price*, 24 Pick. 21; *Butts v. Dean*, 2 Met. 76–79.

G. D. Guild, for respondents, cited *Maneely v. Magee et als.*, 6 Mass. 144; *Chapman v. Durant et al.*, 10 Mass. 47; *French v. Price*, 24 Pick. 20; *Inhabitants of Bangor v. Warren*, 34 Me. 324; *Hutchins v. Orcutt*, 4 Vt. 549; *Wright v. Crockery-Ware Co.*, 1 N. H. 281; *Rand v. White*, 5 Esp. 122; *Sheehy v. Mandeville et al.*, 6 Cran. 253; *The Bark Chusan*, 2 Story, 467.

CLIFFORD, J. It is insisted by the respondents on this state of the case that the note was accepted by the libellants in payment of the bills for the supplies in question, and therefore that the suit cannot be maintained. On the part of the libellants it is denied that they ever received the note in payment, and they insist that the whole case shows that it was not so agreed or intended by the parties. At common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was given. Holt, Ch. J., said in *Clark v. Mundall*, 1 Salk. 124, that a bill shall never go in discharge of a precedent debt, except it be a part of the contract that it should be so. Such bill or note of the debtor himself or of a third party, say the Supreme Court, in *Downey v. Hicks*, 14 How. 249, is never considered payment of a precedent debt, unless there is a special agreement to that effect. Where persons were indebted to a bank, and gave their promissory notes

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for the amount of the debt, it was held by the same court that the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction ; and whether or not there was an agreement at the time to receive them as payment, or whether the circumstances attending the transaction warranted such an inference, was a question of fact for the jury. *Lyman v. The Bank of The United States*, 12 How. 225. Satisfaction of the pre-existing debt as distinguished from an actual payment must always arise from the agreement of the parties, and not from the new security given for that purpose, which only operates as the consideration for the agreement. Hence the agreement must always be proved, and cannot be implied by law in a case where there are no facts or circumstances from which it may reasonably be inferred. *James v. Hackley*, 16 Johns. 277 ; *Peter v. Beverly*, 10 Pet. 567 ; *Whitleck v. Van Ness*, 11 Johns. 414 ; *Callagher's Ex'rs v. Roberts et al.*, 2 Wash. C. C. 191. But the courts of this State have adopted a different rule, and the question in this case must be governed by the rules of law which prevail in the jurisdiction where the transaction took place. Whenever a party bound to a simple contract debt in this State gives his own negotiable security for it, whether it be a bill of exchange or promissory note, it is presumed as a matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. That rule was adopted at a very early period in the history of the State, and has been followed by such repeated decisions that it must be regarded here as the settled law upon the subject. Very little embarrassment results from the practice, as was remarked by this court in another case, so long as the application of the principle is kept within the bounds which the rule itself announces. Properly understood, most or all of the cases admit that it is a presumption of fact, and not of law, and that it may be controlled by any circumstances which show that such was not the intention of the parties to the contract. When the rule was first adopted, it was placed upon the ground that, if an action could be maintained for the original debt, the debtor might also be sued by an innocent

indorsee of the bill or note, and thus be compelled to pay the debt twice ; and that is the principal reason assigned for the rule at the present time. Wherever the doctrine prevails, the new security is regarded in all respects as a substitute for the first promise, and the reasons assigned for its adoption show that it ought to be very cautiously applied in all cases where the remedy upon the new security is not as effectual and comprehensive as upon the one for which it was substituted. Mr. Greenleaf says, where the debtor's own negotiable bill or note is given for a pre-existing debt, it is *prima facie* evidence of payment, but is still open to inquiry by the jury. To the same effect also are the remarks of Shaw, Ch. J., in the case of *Fowler v. Bush*, 21 Pick. 230. He says the rule here differs from that of the common law, only in determining what shall be presumed to be the intent of the parties, from the fact of giving and accepting a negotiable note for a simple contract debt. Without further evidence of intent, we construe it, says the learned judge, to be payment, but the common law deems it to be collateral security. But this presumption may be controlled by other evidence, and when ascertained such intent shall govern. All of the cases upon the subject, in point of fact, agree that the giving and accepting of such a security is only presumptive evidence of the intent to extinguish the prior simple contract-debt, which, like other presumptions of fact, is liable to be repelled by the circumstances. Courts of justice in this State and in Maine, where alone this rule prevails, have often had occasion to inquire and determine what circumstances are, and what are not, sufficient to repel this presumption. In the course of the numerous decisions upon the subject they have established certain general principles, to which it may be useful to refer. If there is any deception or fraud in the giving of the new security, or if it was accepted without a full knowledge of the facts, or under a misapprehension of the rights of the parties, the plaintiff or libellant, as the case may be, is not bound by the acceptance of the note, but may tender it back or produce it at the trial, to be cancelled, and seek his remedy on the original contract. So also, if, when the note was taken he supposed the maker was the only person bound for

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the goods, and that he was not changing the parties, but only taking a new security from the same party, then it is clear, say the Supreme Court of this State, in *French v. Price*, 24 Pick. 22, that the original contract is not so far extinguished as to prevent a resort to it after new parties are discovered. Where negotiable paper had been taken for a pre-existing debt, Shepley, Ch. J., in *Fowler v. Ludwig*, 34 Me. 461, held, that if the paper was not binding on all the parties previously liable, or, if the paper of a third party was received not expressly in payment, the presumption that it was so accepted might be considered as repelled. Similar views were also expressed in the case of *Melledge v. The Boston Iron Co.*, 5 Cush. 170, where it was held, that when the promissory note given is not the obligation of all the parties who are liable for the simple contract debt, and *a fortiori* when the note is that of a third person, and if regarded as in satisfaction, would wholly discharge the liability of the party previously liable, the presumption, if it exists at all, is of much less weight. Applying these principles to the present case, there can be no doubt what the result must be on the state of facts disclosed in the evidence. Testimony was introduced by the libellants tending to show, as matter of fact, that the note was not accepted as payment, but was received only as a convenient mode of adjusting the accounts; and the book-keeper testifies expressly that it was not so accepted, and that he made the transfers on the books without the authority or knowledge of the libellants. Whether so or not, and wholly irrespective of that evidence, I am of the opinion, from the circumstances of the case, that the libellants did not understandingly and with a full knowledge of all the material facts accept the note in satisfaction and discharge of the parties to whom the original credit was given; and there is much reason to conclude, from the evidence, that there was a want of good faith on the part of the maker of the note in negotiating the transaction. His clerk went to the counting-room of the libellants with the note already prepared; and when the maker of it sent the clerk, he must have known that the libellants supposed him to be the owner of one-half part of the bark, else he could not have expected that the proposition

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would have been accepted ; and he well knew at the same time that he had conveyed his interest to another person. Another bill for repairs against the bark was settled on the same day in the same manner, and a conveyance was also made by him of certain real estate. Whether he owned any other property does not appear, but it does appear that he suspended payment shortly afterwards, and that he was insolvent. Taking all of the circumstances together, it is clear that the defence set up in the answer cannot prevail. The decree of the District Court is, therefore, affirmed, with costs.

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A plea which sets forth proceedings in a former suit and a judgment in favor of the tenants, with profert of the record, and also states that the demandant, subsequent to the rendition of the judgment, made application to the court to amend the record by entering judgment for the tenants as upon a nonsuit, which application the court heard and refused, is not double; and that part of the plea which states the application being entirely immaterial, and not in any possible view affecting the question whether the judgment was or was not a bar (the record being wholly unaffected by the application), may be rejected as surplusage.

A judgment of nonsuit even upon an agreed statement of facts cannot be pleaded in bar to a new suit, although rendered by a court of competent jurisdiction, between the same parties, and for the same subject-matter, as in the second suit.

An agreed statement may be the proper foundation of such a judgment as will constitute a bar to a new suit between the same parties for the same cause of action. Judgments upon agreed statements of facts were unknown to the common law, but the general usage of the courts of Massachusetts has sanctioned this mode of trial, and it has become part of the common law of the State.

Where a cause was submitted to the court under an agreed statement which among other things provided that "the court may make any other order or judgment in the case which they shall think it may require," *held*, that the whole controversy was submitted to the court without limitation; and that the court, having jurisdiction of the cause and of the parties, its judgment, until reversed, must be binding in every other court.

By the 84th section of the Judiciary Act, it is provided that the laws of the several States, except in certain cases, shall be regarded as rules of decision in the courts of the United States in cases where they apply.

While a writ of right may still be maintained in the Circuit Court for the District of Mas-

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sachusetts, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit is no longer in force in this district. Certainly not if such judgment was recovered in the State court since the writ of right was abolished by the statute of the State.

THIS was a writ of right, claiming to recover an undivided fifth part of a certain parcel of land in Somerville, in this district. Two pleas were filed by the tenants. First, they pleaded the general issue, or rather tendered an issue on a joinder of the *mise*, on the mere right of the demandant and her seizin, with the usual prayer that recognition be made whether they or the demandant have the greater right to hold the premises, and also praying for an inquiry as to the seizin of the demandant. By their second plea, the tenants set up as a bar to the action a judgment of the Supreme Court of Massachusetts, rendered in a suit brought by the demandant and certain other parties against Henry Hall and Samuel Jacques, the father of the tenants, who had subsequently deceased. In that case, the record showed that the parties made an agreed statement of facts, setting out the evidences of their respective titles, and submitted the cause to the court upon that agreed statement, which, as the plea alleges, concludes as follows: "If the court shall be of opinion, on the facts stated, that the demandants have no right to any part of the demanded premises, they are to become nonsuit, and judgment is to be entered for the tenants. If the court shall be of opinion that the title to the whole of the demanded premises is in the demandants, the tenants are to be defaulted, and judgment is to be entered accordingly. If the court shall be of opinion that the papers show a legal title in the demandants, but under the circumstances the tenants might, in law, have acquired an exclusive adverse possession of any part of the demanded premises, under a claim of title for more than twenty years, so as to gain a title thereto, then the court may refer it to three commissioners, with such instructions as the court may see fit, to determine to what, if any, part of the demanded premises the tenants have acquired a title by an adverse possession of more than twenty years, and the return of such commissioners shall be conclusive between the parties, and judgment be entered accordingly, or the

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court may make any other order or judgment in the case which they may think it shall require." After reciting the agreement of the parties, the tenants by their plea allege in substance and effect that the court afterwards, at a regular term thereof, filed a rescript in the case as follows: "Judgment for the tenants." Whereupon it was considered by the court that the tenants recover against the demandant their costs, taxed at a given sum, as by the record and proceedings thereof in the court more fully and at large appears. Subsequently the demandants, as the plea stated, made application to the court to alter the record by having an entry of nonsuit made therein, and a judgment for the tenants as upon nonsuit, which application was heard by the court, and, after due consideration, was refused. Hall, the first-named tenant in the suit described in the plea, conveyed all his right and estate in the demanded premises to the father of the tenants in this suit, who subsequently deceased, leaving a will, and eight children, and the tenants claimed title to the premises in question as his heirs and devisees, according to the terms and conditions of the will. To that plea the demandant demurred, and showed the following causes of demurrer: First, that the judgment set up in the plea was a judgment for costs only, and did not fix or determine the right or title to the land demanded. Second, that the judgment was rendered on an agreed statement of facts signed by the parties, by which it was stipulated that, if the court should be of opinion that the demandants had no right to any part of the demanded premises, they were to become nonsuit, and judgment was to be entered for the tenants. Third, that the judgment for the tenants was in fact rendered upon a nonsuit. Fourth, that it is apparent from the judgment pleaded that there was no verdict of a jury, no issue joined either of law or fact, no *retraxit* of the demandants, and no other legal ground upon which the judgment could rest, except the agreement of the demandant, to become nonsuit. Fifth, that the plea was double, by alleging the proceedings of the court subsequent to the judgment, of which there is no record.

E. H. Derby and J. P. Robinson, for demandant.

The agreed statement of facts sets forth three propositions:—

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First, a judgment of nonsuit, if demandants showed no title.

Second, a judgment for demandants on default, in case they showed a title.

Third, a reference to commissioners in case the title was found in both parties, and thereupon such further order or judgment as the court shall deem the case to require; and our point is, that the demandants, having failed to show a title to the satisfaction of the court, have been nonsuited, and a judgment for costs has been entered on such nonsuit pursuant to the agreed statement of facts.

The judgment in *Derby et al. v. Hall et al.* does not touch the title or allude thereto, but is a judgment for costs only.

There was no issue in law or in fact between the parties, upon which a judgment to affect the title could be founded.

In pursuance of the agreement of the parties, no judgment could be entered, except upon nonsuit or default.

No judgment at all could be rendered in such case, except in pursuance of such agreement.

The demandants never agreed to anything, except for a nonsuit, in case the legal title should be decided against them.

There is no judgment whatever against them, except for costs, viz. "that defendants recover of the demandants their taxed costs." This court will not go behind the record, and that record must be presumed to show the intent of the parties.

The words in the rescript or message of the court to the clerk in vacation, "Judgment for tenants," are merely preliminary to the judgment, and not the judgment or any part of the same. The rescript merely follows the agreed statement of facts, that, on failure to show title, "demandants are to become nonsuit, and judgment to be entered for tenants." And the judgment of nonsuit in the usual form has been entered for the tenants accordingly.

The established form of a judgment on a verdict in bar of the title of the demandants is one finding the title, viz. "that it is considered that demandants take nothing by their suit, and that the tenants go thereof without day," while in a writ of right, the judgment for tenants is that "the tenants shall hold the de-

manded premises quit of the said demandants and their heirs forever, and shall recover their costs."

The plea is double and defective in form, and introduces matter which, if recorded, would not affect the decision, but, on the contrary, would aid the demurrer.

That a full judgment in a State court upon a writ of entry is no bar to a writ of right in the United States courts, which is a higher remedy.

Counsel further contended, that as there were but four kinds of judgments known to the law, viz. on demurrer, verdict, *retraxit*, and nonsuit, and as this judgment was not either of the first three, it must be the last.

S. E. Sewall, for tenants.

It is too well settled to be disputed, that a judgment between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive. *Le Guen v. Gouverneur et al.*, 1 Johns. Cas. 436 ; 1 Greenl. Ev. §§ 528, 531.

The question, then, is, What was the judgment of the Supreme Court of Massachusetts? The rescript sent to the clerk was in these words, "Judgment for tenants," and so it was recorded by the clerk. Demandant contends that this was not a judgment, but a mere order to the clerk to enter judgment.

But this is an entirely false view of the case. The clerk is merely a ministerial officer, who records the doings of the court. The judgment is itself the act of the court, not of the clerk. The rescript is the judgment, the *ipsissima verba* of the rescript. The clerk did not venture to alter them. The record is the mere evidence of the judgment, not the judgment itself. When the clerk recorded the rescript he recorded the judgment. The judgment of the court is often verbal, as in sentencing prisoners to death, fine, or imprisonment. The words addressed by the court to the prisoner are the judgment; what the clerk writes is the mere record of the judgment.

Demandant asserts that only four judgments are known to the law; now, besides his list, there is, in the practice of Massachusetts, a very familiar one, viz. on an agreed statement, which is

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this very case. Now it does not matter whether the judgment follows the terms of the agreed statement or not. If it be in direct violation of them, it will yet be valid until reversed.

CLIFFORD, J. Three questions are raised by the demurrer for the consideration of the court. But for the sake of convenience, the order in which they are presented in the pleadings will be reversed. They are as follows: 1. Whether the plea is sufficient in point of form; and if so, then, 2. Whether the record of the former suit and judgment set forth in the plea is of a character to operate as a final and conclusive determination of the title of the parties in the court of the State where it was made; and if both of these questions are found in favor of the tenants, then, 3. Whether a judgment upon the merits rendered in this State, by a court having jurisdiction of the parties and the cause, in a plea of land, commenced and prosecuted by a writ of entry, is a bar to a writ of right subsequently prosecuted between the same parties, and for the same premises, in the Federal courts.

It is insisted by the demandant that the plea is double, and therefore bad in point of form, because it sets forth the proceedings in the court on the application of the demandant to amend the record, which proceedings took place subsequent to the rendition of the judgment, and are no part of the same. That suggestion would certainly have weight, if those allegations of the plea were necessary to maintain the defence set up by the tenants; and it would clearly be well founded, under the circumstances of this case, if the other matters set forth in the plea did not remain in full force, and wholly unaffected by those allegations. But it is obvious, if the judgment without those proceedings is of a character to operate as a final and conclusive determination of the title of the parties, then those proceedings are entirely immaterial to the issue of law raised by the demurrer; and if the judgment was not of such a character at the time the record of the judgment was made, still those proceedings are equally immaterial, because the record yet remains without any alteration whatever; so that the question whether the payment is or is not a bar to this suit, in any view that can be taken of the question, is wholly unaffected by those proceedings. According to the

well-settled rules of pleading, therefore, the allegations of the plea setting forth those proceedings, which in themselves are entirely immaterial, may be rejected as surplusage; and if the other matters set forth in the plea are well pleaded, and constitute a sufficient answer to the declaration, the allegations setting forth those proceedings do not vitiate the plea. Examples may be found where the immaterial averment is descriptive of the matter in controversy, or where the immaterial matter is so interwoven with the substance of the plea that the whole allegation becomes material and is subject to a traverse; but the present case falls within the well-known rule, that if the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation on the subject whatever was necessary, it may be rejected as surplusage, and need not be proved; nor will it vitiate even on a special demurrer. 1 Chit. on Plea. (12th Am. ed.) 229; Stephen on Plea. 423; Co. Litt. 303, *b*.

In the second place, it is insisted by the demandant that a judgment of nonsuit is never a bar to a new suit, and that the judgment set forth in the plea is a judgment of nonsuit. That proposition, being twofold, presents two questions, which will be separately considered. While the tenants do not controvert the first branch of the proposition, they expressly deny that the judgment in question is one of nonsuit, or that it was so intended or understood by the court before whom it was rendered. Nonsuit at common law was a mere default or neglect of the plaintiff to pursue his remedy, and therefore he was allowed to begin his suit again upon payment of costs. 3 Black. Com. by Shars. 296. Courts of justice could determine nothing at common law, unless both parties were present in person or by their attorneys, except in cases of default. In the course of the pleading, therefore, if either party neglected to put in his declaration, plea, replication, or the like, within the times allotted by the rules of the court, the plaintiff, if the omission was his, was said to be nonsuit; or if the negligence was on the side of the defendant, judgment was rendered against him for his default. Such a judgment, when rendered against the plaintiff, was only for the costs of the suit, and upon payment of the same he might bring a new action. Those rules of practice

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substantially obtain at the present time, and accordingly it has been determined by the highest authority that a judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter. *Homer v. Brown*, 16 How. 354; *Morgan v. Bliss*, 2 Mass. 113; *Knox v. Waldoborough*, 5 Me. 185; *Bridge et al. v. Sumner*, 1 Pick. 370; *Wade v. Howard*, 8 Pick. 353. These cases fully justify the first branch of the proposition assumed by the demandant; but it by no means follows, as will presently appear, that all of the deductions attempted to be made from the admission can be sustained. Assuming that a judgment of nonsuit is not a bar to a new action, the more important inquiry arises in the case, what is the true nature of the judgment set up in the plea. To show that it is a judgment of nonsuit, and nothing more, the attention of the court is drawn by the counsel of the demandant to the various kinds of judgment as known and understood at common law. He assumes, in the language of a learned commentator, that the judgment of the court is the sentence of the law, and that there can be but four kinds of judgment in cases of this description. 1. Upon demurrer, where the facts are agreed by the parties, and the law is determined by the court. 2. Where the law is admitted by the parties, and the facts are disputed, as in case of judgments on verdicts. 3. Where the facts and law arising thereon are admitted by the defendant, as in judgments by confession or default. 4. Where the plaintiff is convinced that the facts or the law, or both, are not sufficient to support his action, as in judgments on nonsuit, *retraxit*, and discontinuance. 3 Black. Com. by Shars. 395. That course of remark, however, is based upon the assumption that the practice in the courts of Massachusetts is the same in all respects as the practice was at common law; and inasmuch as a final judgment on an agreed statement of facts was unknown in the early jurisprudence of the parent country, so it is insisted that such an agreed statement cannot now be regarded as the proper foundation of such a judgment as will conclusively determine the rights of the parties and constitute a bar to a new suit. Much rea-

son exists to suppose that such was the theory of the common law. General verdicts, however, were often taken subject to the opinion of the court on a special case stated by the counsel; but as nothing appeared on the record except the general verdict, the parties were precluded from the benefit of a writ of error. 3 Black. Com. by Shars. 377. At one time strong doubts were entertained whether a writ of error would lie in the Supreme Court on a judgment rendered in the Circuit Court upon an agreed case. *Keene v. Whittaker*, 13 Pet. 459. Those doubts, however, were soon removed when, upon an examination of the question, it was found that the practice of the court had been to sustain writs of error in such cases almost from the time of its organization. *Faw v. Roberdeau's Ex'r*, 3 Cran. 173; *Tucker v. Oxley*, 5 Cran. 34; *Kennedy v. Brent*, 6 Cran. 187; *Brent v. Chapman*, 5 Cran. 358; *Shankland v. The Corporation of Washington*, 5 Pet. 390; *Inglee v. Coolidge*, 2 Wheat. 363; *Miller v. Nicholls*, 4 Wheat. 311. Three cases have since been reported, in which the point has been directly adjudicated, so that the question may now be considered as closed. *United States v. Eliason*, 16 Pet. 301; *Stimpson v. Railroad Co.*, 10 How. 329; *Graham v. Bayne*, 18 How. 60; *Suydam v. Williamson et al.*, 20 How. 427. General usage in the courts of Massachusetts, "whereof the memory of man runneth not to the contrary," has sanctioned this mode of trial until it has become a part of the common law of the State. Cases are often submitted to the court in that mode, without any other pleading than the declaration. Issues are seldom or never framed in such submissions, except so far as they arise out of the statement of the case. When the practice commenced is not known, and in all probability it would be as vain as it would be useless to attempt to trace its origin. Four cases at least, where the trial was in that mode, are reported in the first volume of the Massachusetts Reports. They were all conducted by eminent counsel, and were severally heard and decided by a learned court. *Livermore v. The Newburyport Ins. Co.*, 1 Mass. 264; *Payson Adm. v. Payson et al.*, 1 Mass. 284; *Gordon et al. v. Pearson*, 1 Mass. 324; *Porter v. Bussey*, 1 Mass. 436. No one can read any one of

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those cases and fail to see that the practice as now known and universally understood was at that early period equally familiar to the bar and the court. From the year 1804 to the present time, the practice of trying causes in that mode has constantly increased, and it was never doubted, so far as appears, that a judgment rendered on such a foundation, if purporting in its terms to be a final judgment, was a conclusive determination of the matter in controversy, and as such that it might be pleaded in bar to a new suit between the same parties for the same cause of action. Maine at that period was a part of Massachusetts, but since the act of separation, her courts have adopted and sanctioned the same practice, which has been continued to the present time. *Hubbard v. Cummings*, 1 Me. 11; *Fosdick v. Gooding et al.*, 1 Me. 30; *Lincoln and Kennebec Bank v. Richardson*, 1 Me. 79; *Hallowell v. Gardiner*, 1 Me. 93; *Jewett v. The County of Somerset*, 1 Me. 125. To admit that there can be a doubt upon this question, would be to prejudice vast interests long since supposed to rest upon the irrevocable determinations of the courts. There is no ground for doubt upon the subject, any more than in respect to a judgment on the verdict of a jury. Having come to this conclusion, it now becomes necessary to examine the agreement under which the cause was submitted to the determination of the court. Such agreements are usually appended to the statement in the case, and in fact form a necessary part of it. *Livermore v. The Newburyport Ins. Co.*, 1 Mass. 269. In the first place, the plea states that the parties appeared at a regular term of the court, and agreed to submit the action to the decision of the court, on the following statement of facts: That agreement recites the nature of the action, describes in general terms the land in controversy, and contains a full statement of the evidence of title on which each party relied. By the terms of the agreement it was stipulated, 1. That if the court came to the conclusion, on the facts stated, that the demandants had no right to any part of the demanded premises, then the demandants were to become nonsuit, and judgment was to be entered for the tenants. 2. On the other hand, if the court, in view of the facts, came to the conclusion that the title to the

whole of the premises in question was in the demandants, *then the tenants were to be defaulted*, and judgment was to be entered accordingly. 3. But if the circumstances were such, in the opinion of the court, that the tenants might have acquired title to any portion of the demanded premises by adverse possession, then, although the paper evidence showed the title to be in the demandants, still the court was authorized to refer the matter to three commissioners, with such instructions as the court might see fit to give in order that the commissioners might determine to what, if any, part of the same premises, the tenants had acquired a title by such adverse possession; but it was expressly stipulated that the return of the commissioners should be conclusive between the parties, and that judgment should be entered accordingly. Under each of the three clauses of the agreement already recited, the parties themselves prescribed the judgment which the court should enter in the case. No discretion whatever was vested in the court as to the judgment to be rendered under any one of those three clauses of the agreement. Demandants were to be nonsuited under the first clause, and the tenants were to be defaulted under the second, and judgment was to be rendered on the return of the commissioners under the third clause. Nothing, therefore, can be plainer than the fact that the court, in giving the judgment in question, did not act under any one of those three clauses. It is not pretended that the demandants were ever nonsuited, or that the tenants were defaulted, or that the cause was ever referred to commissioners. Were there no other clause in the agreement, it would then be clear that the judgment was erroneous. Such, however, is not the fact, as appears from the fourth clause of the agreement, which provides as follows: "*Or the court may make any other order or judgment in the case which they shall think it may require.*" Under this last clause, the whole controversy was submitted to the court on the facts stated, without restriction or limitation. To suppose otherwise would be to do violence to the language employed, and to make a new agreement for the parties instead of expounding the one they have made for themselves. It is suggested, however, that the fourth clause was intended to

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apply only to the special proceeding contemplated under the third, and that it should be so limited and qualified. But that suggestion cannot be sustained, for the reason that the third clause is as independent, full, and complete as the first and second ; and also, for the better reason, that it expressly provides that "the return of the commissioners shall be conclusive between the parties, and judgment be entered accordingly." Admitting this construction of the agreement to be correct, it then follows that it was entirely competent for the court to render judgment for the tenants, or judgment for the demandants, accordingly as they found for the one or the other party ; and such a judgment, undoubtedly, if properly entered, would be a conclusive determination of the matter in controversy in the courts of this State. Assuming that the court had power to render a final judgment for the tenants, the next inquiry is, Was the judgment which they rendered one of that character ? It is contended by the demandant that it is a judgment for costs only. No question is made as to the facts stated in the plea, but the argument on this point is addressed to the construction of the language employed by the court in giving the judgment, and the argument is, that the language so employed, when taken in connection with the agreement under which the court acted, shows that the judgment is one for costs only, which impliedly admits that the language is correctly recited in the plea. Had there been any doubt as to the correctness of that part of the plea which recites the judgment, it should have been controverted by a proper replication. Under the admissions of the demurrer, it must be assumed that the judgment as recorded is a judgment for the tenants, in the manner and form as stated in the plea. Taking that for granted, I am of the opinion that the judgment is in legal effect precisely what it purports to be,—a final judgment for the tenants. Clearly it is not a judgment of nonsuit, and therefore was not rendered under the first clause of the agreement ; and it is equally clear that it could not have been rendered under the second clause, because it is a judgment for the tenants, and not for the demandants. All agree that the third clause was inapplicable to the case, and that no such judgment as is therein

contemplated could have been entered by the court, because the case was never referred to commissioners. It comes to this, then, either that the court acted under the fourth clause or they acted without authority. For the argument's sake, however, let it be admitted that the construction here given to the fourth clause is not correct, and that the judgment is erroneous. Still, it is a final judgment of a court having jurisdiction of the cause and of the parties, and in the opinion of this court its validity cannot here be questioned. Where a court has such jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, the judgment, until reversed, must be regarded as binding in every other court. Errors and irregularities, if any, must be corrected by some direct proceeding to set the judgment aside, either before the same court or in an appellate court. *Elliot v. Peirsol*, 1 Pet. 340; *Thompson v. Tolmie*, 2 Pet. 168; *Cook v. Darling*, 18 Pick. 393; *Granger v. Clark*, 22 Me. 128; *Smith v. Keen*, 26 Me. 423; *Banister v. Higginson*, 15 Me. 73; *Simms v. Slacum*, 3 Cran. 306; *Voorhees v. Bank of United States*, 10 Pet. 478. Lastly, it is insisted by the demandant that the judgment set up in the plea is not a bar to this suit, because it was rendered in a plea of land commenced and prosecuted by a writ of entry. Beyond question the writ of right is in its nature the highest writ in the law. It lies only for the recovery of an estate in fee simple, and is the last resort of a party who has been ousted of real property. This writ, says Judge Blackstone, lies concurrently with all other real actions in which an estate of fee simple may be recovered, and it also lies after them, being as it were an appeal to the mere right when judgment hath been had as to the possession in an inferior possessory action. 3 Black. Com. by Shars. 193; Jackson on Real Actions, 276; Stearns on Real Actions, 350. Such a remedy still exists at common law, and it existed in the courts of Massachusetts until 1840, when it was abolished by statute. Rev. Stat. Mass. ch. 101, sec. 51. A writ of right was a proper remedy in the courts of Massachusetts, as at common law, prior to that period; and it was held by the Supreme Court, in the case of *Homer v. Brown*, 16 How. 363, that the repeal of the statute

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conferring the remedy did not repeal it as process in the Circuit Court for this district. But the same court held, in the same case, that it was as process alone that it continued in the Circuit Court for this district, and that the action was subject to the limitation prescribed by the State law as to the time within which such a remedy may be prosecuted. Writs of right were abolished in Massachusetts before the rendition of the judgment set up in the plea of the tenants. When that judgment was rendered, therefore, the writ of entry was the highest writ known to the law of the State, and the judgment in question conclusively settled the title of the parties under the law of the State, so that the question here presented is not one respecting the form of the remedy, but presents the inquiry whether there can be one rule of property in the courts of the State, and another and a different rule touching the same subject-matter in the Circuit Court for the district. By the thirty-fourth section of the Judiciary Act, it is provided that the laws of the several States, except in certain cases not material to the present inquiry, shall be regarded as rules of decision in the courts of the United States in cases where they apply. Repeated decisions of the Supreme Court have established the doctrine that the Federal courts adopt the local law of real property as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which has become a fixed rule of property. *Jackson v. Chew*, 12 Wheat. 153; *Henderson v. Griffin*, 5 Pet. 151; *Daly v. James*, 8 Wheat. 495; *Lane v. Vick*, 3 How. 464. While, therefore, a writ of right may still be maintained in the Circuit Court for this district, the common-law rule that a final judgment in a writ of entry is not a bar to such a suit is no longer here in force; certainly not, if such judgment was recovered in the State court since the writ of right was abolished by the statute of the State. To regard the writ of right in the Circuit Court of the district as still overriding a final judgment recovered on a writ of entry in the State court, would present the anomaly of one rule of property in the State courts, and another and a different rule in the Circuit Court in respect to the same

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subject-matter. Infinite mischief would ensue from such a contrariety in the rules of property in the respective jurisdictions ; and it was to prevent such a state of things that the thirty-fourth section of the Judiciary Act was passed. That section does not apply to process, it merely furnishes a rule of decision, and was not intended to regulate the remedy. *M'Keen v. Delancy*, 5 Cran. 22 ; *Wayman v. Southard*, 10 Wheat. 1 ; *Polk's Lessee v. Wendall*, 9 Cran. 87 ; *Mut. Ass. Society v. Watts*, 1 Wheat. 279 ; *Shipp et al. v. Miller*, 2 Wheat. 316 ; *Thatcher v. Powell*, 6 Wheat. 119 ; *M'Cluny v. Silliman*, 3 Pet. 270 ; *Green v. Neal*, 6 Pet. 291. In view of the whole case, I am of the opinion that the plea of the tenants is sufficient, and constitutes a bar to the present suit. Demurrer overruled. Plea adjudged sufficient.

MAINE DISTRICT.

APRIL TERM, 1860.

JAMES H. TROTT v. THE CITY INSURANCE COMPANY.

A by-law which provides that any difference or dispute which may arise in relation to any loss sustained or alleged to be sustained by any person insured under a policy issued by an insurance company, shall be referred to and determined by certain referees; and in case any suit shall be commenced without such offer of reference, the claim of the party so commencing the suit shall be released and discharged, includes within the agreement for reference, not only the liquidation of the amount to be recovered, but also the question as to whether there has or not been any loss at all.

The effect of such a by-law, if it be valid, is to oust the courts of their jurisdiction.

Such a by-law is void.

Where the effect of such a by-law is to prevent the insurance party from coming into a court of law, even though made a part of the policy by express agreement, it cannot be supported.

ACTION of assumpsit on a policy of insurance. Insurance was effected on three sixteenths of the bark *Hellespont*, in the City Insurance Company, for the sum of forty-one hundred and twenty-five dollars, for the period of one year from the 23d of December,

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1857. The claim is for a total loss on the 3d of April following.

Plea in abatement to the writ, setting forth that the writ was sued out upon a policy of insurance, to recover the amount of a loss alleged to have been sustained by the plaintiff, within the terms of the policy, and that within the terms of the policy the by-laws passed by the company were made a part of the contract, to which the plaintiff had agreed to conform, and especially to the twentieth by-law, which was as follows: "In case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained, by any person insured under a policy issued by this company, the same shall be referred to and determined by referees, to be chosen mutually by the assured and the board of directors; and no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have offered to submit his claim to such reference. In case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing shall be released and discharged, and the company released from any liability under it." Under this by-law, the defendants alleged in their plea, it was the duty of the plaintiff, mutually with the defendants, to have agreed upon and chosen referees to determine upon the difference and dispute; and having failed so to do, the defendants were released from any liability to answer to the suit, and moved that the writ be quashed.

To the plea the plaintiff demurred. Defendants joined in the demurrer.

Anderson & Webb, for plaintiff, and in support of the demurrer.

Agreements to submit all disputes to arbitration cannot oust the courts of their jurisdiction. *Kill v. Hollister*, 1 Wils. 129; *Thompson et al. v. Charnock*, 8 T. R. 139; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Tobey v. County of Bristol*, 3 Story, 800; 2 Story's Eq. Jurisp. § 1457; *Street v. Rigby*, 6 Ves. Jr. 815; 1 Story's Eq. Jurisp. § 670; *Gray v. Wilson*, 4 Watts, 39; *Hill v. More*, 40 Me. 515; 2 Parsons, Mar. Law, 483; *Nute v. Hamilton*

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Mut. Ins. Co., 6 Gray, 174 ; *Amesbury et als. v. Bowditch Mut. F. Ins. Co.*, 6 Gray, 596 ; 2 Arnould on Ins. 1245.

Shepley & Dana, for defendants, and in behalf of the plea.

The only question that arises under the pleadings is this : Can a suit be maintained for a loss under the policy, without a prior *offer* to submit the matter in dispute to arbitration ? This is a mutual company, and plaintiff, as a member thereof, is bound by its by-laws. The current of modern decisions sets in favor of upholding agreements not to bring suit until an *offer* to refer has been first made. This is discussed in 2 Parsons, Mar. Law, 484. See, in *Russel v. Pelligrini*, 38 Eng. L. & Eq. 101, remarks of Campbell, Ch. J. ; *Avery v. Scott*, 8 Welsby, H. & G. 497. There is a distinction between a case where it is agreed no suit shall be brought and one where it is provided that before suit an offer to refer must be made. The offer to refer was, by the twentieth section of the by-laws, made a condition precedent to a suit. That part of the by-law discharging the company from all claim of loss where suit is brought without the previous offer to refer, is an independent contract, and does not affect the previous clause.

CLIFFORD, J. Both parties agree that the only question which arises in the case of any considerable importance is, whether a suit can be maintained by the plaintiff under the policy, without a prior offer on his part to submit his claim to arbitration. It is insisted by the defendants that the terms of the by-laws bar the right to sue in a case like the present, until the insured has offered to submit his claim to referees. That construction of the by-law is virtually conceded by the plaintiff, but he insists that the by-law, if such be its true construction, is invalid, because its effect is to oust the jurisdiction of the courts. Looking at the language of the provision, I am of the opinion that it is sufficiently comprehensive to sustain the views of the defendants. Omitting certain unimportant words, it provides, in effect, that any difference or dispute in relation to any loss sustained, or alleged to be sustained, shall be referred to and be determined by referees, to be chosen mutually by the assured and the board of directors, and that no holder of a policy shall be entitled to maintain any

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action thereon against the company until he shall have made the offer so to refer. Loss alleged is as much within the provision as a loss sustained, and if the provision be valid, it is indispensable that the plaintiff should both allege and prove the prior offer to submit his claim to referees. He must offer to refer as a condition precedent, no matter what the question in dispute is, else he cannot maintain any action on the policy. Obviously, therefore, it is a mistake to suppose that the by-law admits the loss, and looks only to the liquidation of the amount to be recovered. On the contrary, it is clear, I think, that the words, "or loss alleged to be sustained," were intended to exclude that construction, and make it certain that no action should be maintained against the company until such prior offer had been made. Confirmation of this view, if any is needed, is derived from the subsequent clause of the same by-law, which provides that, in case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing such suit shall be released and discharged, and the company be released from any liability under it. Reference is made by the defendants to certain expressions and stipulations in the policy as tending to support a contrary construction; but I am of the opinion that they have no such tendency. Losses are to be paid in sixty days after proof and adjustment; and the policy provides, that if any dispute shall arise relating to a loss, it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award in writing shall be conclusive and binding on all parties. Standing alone, that provision might give some countenance to the views of the defendants. Such, however, is not the fact, for the same instrument, in the next sentence but one, provides that, in case of loss, the same shall be adjusted and settled according to the twentieth section of the by-laws; and after declaring the by-laws to be a part of the contract of insurance, reads, "and these presents shall themselves be a sufficient bar against any suit commenced against the company, contrary to the true intent and meaning of the twentieth section of the by-laws." It is plain, therefore, that the twentieth section of the by-laws is adopted without restriction or modification, and consequently that it embraces any and every

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difference or dispute in relation to any loss sustained or alleged to be sustained by any person. Nothing, therefore, can be more certain than that the effect of the by-law, if it be valid, is to oust the jurisdiction of the courts. Every difference or dispute must be referred to and determined by referees ; and the policy expressly provides that their award in writing shall be conclusive and binding on all the parties. To say that a suit may afterwards be brought upon the award is not a satisfactory answer to this objection. Having come to this conclusion, the only remaining inquiry is, whether the by-law is valid, and I am of the opinion that it is not. Judge Story, in the case of *Tobey v. The County of Bristol*, 3 Story, 819, divided the cases upon this subject into two classes : one where an agreement to refer to arbitration was set up as a defence to a suit, either at law or in equity, and the other, where the party as plaintiff, sought to enforce such an agreement by a bill in equity, for a specific performance. Both classes, says the learned judge, have shared the same fate. Courts of justice have refused to allow the former as a bar or defence against the suit, and have declined to enforce the latter as ill-founded in point of jurisdiction. Mr. Chitty adopts the rule laid down in *Kill v. Hollister*, 1 Wils. 129, that a clause in an agreement, that, if any dispute should arise, the matter in difference should be referred to arbitration, is no defence to an action. Chitty on Con. 792. Lord Kenyon said, in *Thompson v. Charnock*, 8 T. R. 140, it is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction, and with the qualification admitted in *Goldstone et al. v. Osborne et als.*, 2 C. & P. 550, the decisions in the English courts have been uniform to the same effect until within a very recent period. *Tattersall v. Groote*, 2 B. & P. 131 ; *Mitchell v. Harris*, 2 Ves. Jr. 129 ; *Street v. Rigby*, 6 Ves. Jr. 815 ; *Wellington v. Mackintosh*, 2 Atk. 569 ; *Gourlay v. The Duke of Somerset*, 19 Ves. Jr. 430 ; *Milne v. Gratrix*, 7 East, 607 ; *Clapham v. Higham*, 1 Bing. 87 ; *King v. Joseph*, 5 Taunt. 452. Similar views have also been held by the State courts in this

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country, in repeated instances. *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Gray v. Wilson*, 4 Watts, 39; *Hill v. More*, 40 Me. 515; *Allegre v. Maryland Ins. Co.*, 6 H. & J. 408; *Contee v. Dawson*, 2 Bland, 264; *Haggart v. Morgan*, 4 Sand. (S. C.) 198; Same case, 1 Seld. 422; *Nute v. Hamilton Ins. Co.*, 6 Gray, 174; *Hall v. People's M. F. Ins. Co.*, 6 Gray, 185; *Cobb v. N. E. M. M. Ins. Co.*, 6 Gray, 193; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 596. Text-writers, both English and American, have long regarded it as a settled principle of law, that the parties to a contract cannot oust the jurisdiction of the courts by any agreement to submit the matters in difference to arbitration. 2 Arnould on Ins. 1245; 2 Story's Eq. Jurisp. § 1457; 2 Parsons, Mar. Law, 483. Many additional decisions and authorities might be added to this list, where the same unqualified doctrine is laid down and enforced, and I am not aware that the soundness of the rule established in the leading case has ever been questioned by an American court. No such case has been cited by the defendants, and it is believed that none such can be found. But it is insisted by the counsel for the defendants, that certain recent decisions in England have adopted a different rule upon the subject. *Russel v. Pelligrini*, 38 Eng. L. & Eq. 101; *Avery v. Scott*, 8 Welsb., H. & G. 497; *Livingston v. Ralli*, 5 Ell. & Bl. 132. Speaking of these cases, Thomas, J., says, in *Cobb et al. v. The N. E. M. M. Ins. Co.*, 6 Gray, 193, they may possibly lead to some revision and qualification of the doctrine as heretofore understood. Nothing was decided in the case of *Russel v. Pelligrini* which warrants any such inference as is attempted to be drawn from it. Suit was brought in that case by a ship-owner upon a charter-party, which contained a clause that all matters in difference should be referred to arbitration. Damages for the unseaworthiness of the ship were claimed by the charterer, but the ship-owner refused to refer that claim, and brought an action for the agreed freight. After the suit was entered in court, the defendant obtained a rule under the common-law procedure act, calling upon the plaintiff to show cause why all further proceedings in the action should not be stayed, and the rule was made absolute; the court holding that the re-

spective claims were in the nature of cross-demands, which it was intended should be referred within the eleventh section of that act. Lord Campbell admitted that, when a cause of action has arisen, the courts cannot be ousted of their jurisdiction, but added, that parties may come to an agreement that there shall be no cause of action until their differences have been referred to arbitration. Suppose that to be so, still the principle cannot affect the decision in this case, because no such agreement was made by the parties, as has already sufficiently appeared. Reference is also made to the case of *Livingston v. Ralli*, but it decides nothing which is immediately applicable to this case. It was an action to recover damages for a breach of an agreement to refer, alleging readiness on the part of the plaintiff, and a refusal on the part of the defendant; and the court, contrary to the case of *Tattersall v. Groote*, 2 B. & P. 131, held that the action lay. On that occasion, the court took a distinction between the case where the defendant relies on such an agreement as a defence, and a case where the plaintiff seeks damages for not fulfilling the agreement. There is not a word in the case, however, inconsistent with the established doctrine, that no such agreement can oust the jurisdiction of the courts in a case where the loss is not admitted. All things considered, I am of the opinion that the true rule is stated by Coleridge, J., in *Avery v. Scott*, 8 Welsb., H. & G. 496, overruling *Scott v. Avery*, page 487, in the same volume. He says there is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent, with respect to the mode of settling *the amount of damage*, or the time for payment, or any matters of that kind *which do not go to the root of the action*. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported. That qualification to the general doctrine, as stated in the earlier cases, was admitted in *Hill v. Moore*, 40 Me. 515; and I am inclined to think it is one that ought to be sustained. But the present case is not within that qualification, and consequently the demurrer is sustained, and the plea adjudged bad.

MASSACHUSETTS DISTRICT.

MAY TERM, 1860.

ELISHA ATKINS v. CHARLES PEASLEE.

Where certain merchandise was stored in private warehouses by the plaintiff, with the consent of the collector of customs, but without expense to him or the United States, and it appeared that this arrangement was made by the plaintiff because he desired to warehouse his goods, and thus obtain the benefit of the warehouse laws, and that the defendant would not assent to such deposits except on condition that the plaintiff would pay to him, in his official capacity, half the usual rates of charges on similar goods stored in the public warehouses. *Held*, 1. That the goods were "warehoused"; 2. That the stipulated sum was rightfully received by the collector, and that the same could not be recovered back in an action for money had and received.

THIS was an action of assumpsit for money had and received, and the case came before the court upon an agreed statement of facts as follows: On the 24th of June, 1853, the plaintiff imported into the port of Boston, in the bark Tom Corwin, from Cienfuegos, sundry hogsheads of molasses, and also sundry hogsheads and tierces of sugar, of which he duly made entry for warehousing, and requested the defendant, who was collector of customs for said port of Boston, to cause the same to be stored in the public warehouses at the said port, which the defendant declined to do, for the reason that said warehouses were full. The plaintiff thereupon procured, at his own expense, and without cost or charge to the defendant or the United States, accommodations for two hundred and eighty-five hogsheads and five tierces of sugar, in a store in Broad Street, and ten hogsheads of molasses on Packard's Wharf, and the defendant assented to the deposit of the said sugar and molasses at those places under the provisions of the warehouse laws, on condition that the plaintiff would pay to the defendant, as collector of the customs for said port, one half the usual rates of storage charged on similar goods deposited in public warehouses. This condition was submitted

to by the plaintiff, in order to enable him to warehouse his merchandise as aforesaid. On the withdrawal of the merchandise, the sum of \$145.19 was demanded by the defendant as and for storage of said sugar and molasses, which plaintiff paid defendant. If, upon the foregoing statement of facts, the court should be of opinion that the defendant had no legal right to impose such condition and charge half-storage, on the aforesaid merchandise of the plaintiff, then judgment to be entered for the plaintiff for the sum of \$145.19, with interest thereon from the time the same was paid, together with costs; but if the court should be of opinion that the charge was legal, then judgment to be entered for defendant, with costs.

Milton Andros, for plaintiff.

By the acts of August 6, 1846, and of April 20, 1818, 3 Stat. at Large, 469, and the instructions of the Treasury Department of February 17, 1849, stores where goods are warehoused must be either public warehouses or private bonded warehouses, and the collector has no right to permit any others to be used. There was no service performed by defendant. There is no rate except for goods stored either in a public or a private bonded warehouse, and the plaintiff's merchandise was stored in neither. By the agreement the warehousing was at the expense of the importer, and he cannot be held to pay twice.

C. L. Woodbury, for defendant.

Warehousing to be at the charge of the importer. 1 Stat. at Large, 667, §§ 53, 55, 56, 62. A service was performed by the United States. Act of 1846, §§ 1, 3, 7, 34. The act of 1841, § 6, confers a general power as to warehousing imported merchandise upon the Secretary of the Treasury; and the act of 1846 enlarges that power, and gives full effect to the authorizing of private stores to be used by the government. § 5.

CLIFFORD, J. Most of the difficulties that surround the case arise from the incompleteness of the statement of facts; as, for example, it is stated that the goods were imported on the 4th of June, 1853, but it nowhere appears when the importation was withdrawn from the operation of the warehouse laws. Entry for warehousing, it is stated, was duly made, and the case shows that

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the merchandise was subsequently withdrawn; but the agreed statement furnishes no means of determining when the withdrawal took place, except what may be inferred from the amount demanded and paid for the storage. Full provision was made by the act of the 28th of March, 1854, for the selection, use, and regulation of private warehouses under the warehousing system of the United States; but it is insisted by the counsel of the plaintiff, that the provisions of that act have no application to this case, and, considering the small amount demanded and paid for the storage, I am inclined, in the absence of any more explicit statement, to adopt that view of the case. Assuming that to be the correct view of the facts, it then appears that the goods were duly entered for warehousing at the time of their importation, and remained on deposit under the act of the 6th of August, 1846, until they were withdrawn. 9 Stat. at Large, p. 53. Nothing, however, can be more certain than the fact that the goods were duly entered for warehousing, and not for consumption; and the agreed statement is explicit, that the defendant assented to the deposit of the same at the places before mentioned, under the provisions of the warehouse laws. Application was made by the plaintiff for that privilege to the defendant, as collector of the port, and the assent was given, on the condition that the plaintiff would pay to the defendant, as collector of the customs, half the usual rate of storage charged on similar goods, deposited in the public warehouses. All of the goods were deposited under the warehouse laws, and the clear inference is that the plaintiff enjoyed all the benefits of the warehouse system during the period they so remained on deposit; and the goods were finally withdrawn under the warehouse regulations. Whether any protest was ever made does not appear, but it is certain that nothing of the kind is mentioned in the agreed statement. But it is insisted by the plaintiff that no services were performed by the defendant, or any other of the officers of the revenue, that authorized him to charge anything for the storage of the goods, and that the places of deposit were neither public nor private bonded warehouses, and consequently that the defendant had no authority, as collector of the port, to make any such demand as was

made in this case. Both of these propositions seem to be relied on by the plaintiff, and yet, in another part of the argument, he concedes that if the goods had been stored in storehouses, properly selected and designated as private bonded storehouses, he would have been liable for the half-storage, which hardly seems consistent with the first proposition. Waiving that matter, however, his objections to the payment of the storage are twofold: first, he insists that the defendant rendered no service for which, either in law or equity, he was, entitled to compensation; and, second, that the places of deposit were not private bonded warehouses, within the meaning of the acts of Congress establishing the warehouse system. His first proposition he endeavors to maintain by affirming as a matter of inference, from the agreed statement, that all the defendant did in the premises was to refuse the plaintiff his right to store the goods in a public warehouse, and then illegally to consent that he might store them in stores procured by himself, provided he would pay all the expense, and also the further charge which is the subject of complaint in this case. Looking at the agreed statement, however, I am of the opinion that the theory of fact assumed by the plaintiff in his first proposition must receive very considerable qualification. Undoubtedly, he procured the "accommodations" for the goods at his own expense, and without cost or charge to the defendant or the government; but it is nowhere stated that the goods, after being placed in warehouse, were not in the custody and under the control of the custom-house officers. Unless they were so, it is difficult to see in what respect they were under the provisions of the warehouse laws, or what necessity there was for withdrawing them from the warehouse entry, which was made at the time the goods were imported. Services, therefore, must have been performed by the officers of the customs, else it is not true that the goods were deposited, or withdrawn from the original entry under the warehouse laws. Fraud is not to be presumed; and clearly, unless both parties were guilty of a departure from a positive law, the theory of fact assumed by the plaintiff cannot be sustained.

Having disposed of the first point made by the plaintiff, it

remains to consider the second, which is, that the plaintiff is entitled to recover back the sum paid, because the goods were not deposited in a private bonded warehouse. Previous to the act of the 6th of August, 1846, the privilege of warehousing importations in other than public stores was confined, except in certain special cases, to teas, wines, and distilled spirits. Importers of teas were authorized by the sixty-second section of the act of the 2d of March, 1799, either to secure the duties or give bond to the collector of the district in double the amount of the duties, with condition for the payment of the same in two years from the date of the bond; and in case any importer of such goods elected to give the bond, it was made the duty of the collector to accept it without surety, provided the importer deposited the importation in one or more storehouses agreed upon between the importer and the inspector of the revenue. Two locks were then required to be affixed to each storehouse, the key of one to be kept by the importer, and the key of the other by the inspector, whose duty it was to attend at all seasonable hours to deliver the teas; but no delivery could be made till the duties were paid, nor without a permit in writing, under the hand of the collector and naval officer. 1 Stat. at Large, p. 674. Similar provision was made in behalf of the importers of wines and distilled spirits, by the first section of the act of the 20th of April, 1818, whereby it was left at their option, either to secure the duties or give bond in double the amount for the payment of the same in twelve calendar months; and if they elected to give the bond, it was made the duty of the collector to accept the same without surety, on the condition that the goods should be deposited at the expense and risk of the importer, in such public *or other storehouses* as should be agreed upon between the importer or other officer for the inspection of the revenue. All such importations also were required to be kept under the joint locks of the inspector and the importer; and no delivery could be made of such wines or distilled spirits without a permit in writing, under the hand of the collector and naval officer. 3 Stat. at Large, p. 469. Unclaimed goods have been the subject of frequent legislation, and the twelfth section of the act of the 30th

of August, 1842, made provision for the neglect or failure of the merchant to pay the duties on the completion of the entry ; but none of these provisions have any application to the question under consideration. 3 Stat. at Large, p. 562. Deposit of the wines or distilled spirits, it will be seen, might be made under the first section of the act of the 20th of April, 1818, in public *or other storehouses*, and that privilege was extended by the first section of the act of the 6th of August, 1846, to all importations properly entered for warehousing, according to the provisions of that act. Those places for the deposit of importations were called "other storehouses" in the act of the 20th of April, 1818, and "other stores" in the act of the 6th of August, 1846, which is entitled an act to establish a warehousing system. They had never been described as private bonded warehouses in the previous legislation of Congress, and are not so denominated in the last-named act. 9 Stat. at Large, p. 53. Authority was given to the Secretary of the Treasury, by the fifth section of the last-named act, to make such regulations from time to time, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. Assuming to act under that authority, the Secretary of the Treasury, on the 17th of February, 1849, issued certain instructions to the collectors of the customs. Three classes of bonded warehouses are designated by those instructions: first, stores owned by the United States or leased to them prior to that time, and known as public stores ; second, stores in the possession of an importer, and in his sole occupancy for the storing of merchandise imported by himself ; third, stores in the occupancy of persons desirous of engaging in the storage business. Every person, before he could be permitted to open such a store, was required by the instructions to give bond with sureties, exonerating the government and all the officers of the customs from any risk growing out of the joint custody of the goods stored in such storehouses. Classes two and three, mentioned in the instructions, are therein denominated private bonded warehouses, and all such stores are required to be placed in the custody of an inspector ; but it is expressly

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directed, in the same instructions, that merchandise entered for warehousing will only be stored in these stores when the same are agreed on by the proper officer of the revenue and the importer, owner, or consignee. Whether all of these regulations were authorized by the fifth section of the act of the 6th of August, 1846, is a question that need not be considered at the present time, as I am of the opinion that the plaintiff, after having deposited the goods as goods in warehouse, and enjoyed all the benefits of the warehouse system, cannot now, under the circumstances of this case, turn round and deny that the places of deposit agreed on between himself and the collector were proper places for the storage of the goods, within the meaning of the acts of Congress then in force establishing the warehouse system. Recurring to the explanations of the agreed statement already given, it will be seen that he duly entered the goods for warehousing, and that the collector, after the accommodations for the goods had been procured by the plaintiff in the manner before stated, assented to the deposit of the same in the places so procured, under the provisions of the warehouse laws, on the condition that the plaintiff would pay to him, as collector of the customs, half the usual rates of storage charged on similar goods in the public warehouses. Payment was accordingly made to the defendant, as collector, on the withdrawal of the merchandise, and of course it was the duty of the collector to render an account of the same to the department. Suppose a bond might properly have been required of the owners of the store, and of the wharf, under the before-mentioned instructions, still, it was a security for the benefit of the government, and it did not injuriously affect the rights of the plaintiff, that none such was taken. All his rights were secured under the arrangement, and having paid the charge for storage, under the agreement he made with the collector, he cannot now recover it back. According to the agreement of the parties, judgment must be entered for the defendant, with costs.

RHODE ISLAND DISTRICT.

JUNE TERM, 1860.

LORD, WARREN, EVANS, & Co. v. LOUIS J. DOYLE *et als.*

Actual knowledge of the existence of a prior unrecorded mortgage has the same effect as if the mortgage had been duly recorded.

Where a person purchasing real estate gave back to his grantor a mortgage, to secure a part of the consideration money, and subsequently sold a portion of the property to certain third parties, with the agreement that they should assume a certain proportion of the liabilities to which it was subject up to the time of such sale, and among such liabilities was the mortgage to his original grantor; *Held*, that the subsequent purchasers had sufficient knowledge of the prior unrecorded mortgage.

THIS was a bill in equity, wherein the complainants prayed that certain unrecorded mortgage deeds held by them might be decreed, as against the respondents, to be valid and subsisting liens upon certain real estate therein described, in the same manner and to the same effect as if the deeds had been duly recorded at the time of their execution and delivery. The respondents named in the bill of complaint were Louis J. Doyle, William W. Bishop, Walter W. Updike, Nathaniel Bishop, Charles Jackson, and two corporations, to wit, the Rhode Island Bleach and Cambric Works, and the Coddington Manufacturing Company. Complainants' case was in substance thus stated in the bill of complaint: Louis J. Doyle, on April 15, 1856, purchased certain real estate in Newport, and on the same day with the purchase gave back to his grantor, the Coddington Manufacturing Company, a mortgage, to secure a part of the consideration, viz. the sum of \$ 30,903, which mortgage was duly executed and recorded. Doyle then commenced and prosecuted, on the said purchased estate, the business of manufacturing cotton goods, under the name and style of the Rhode Island Manufacturing Company. During the progress of his business he became indebted to the complainants for certain advances, evidenced by

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certain promissory notes, bills of exchange, drafts, and a balance of account stated, and executed to them two mortgages upon the above-mentioned estate, one dated August 21, 1856; and another upon the day following, to secure these claims.

About the 6th of September, 1856, Doyle proposed to Walter Updike and William W. Bishop, two of the other respondents, to form a copartnership for the purpose of carrying on the same business as that in which he was engaged, and they acceded to the proposal, agreeing that they were each to assume one third of the debts and liabilities he had incurred in the business on and after a given day in that year, which agreement embraced the sums complainants had advanced to Doyle. The articles of copartnership were drawn up between the parties on September the 27th of that year; and Doyle executed to Updike and Bishop deeds of one third each of the before-mentioned estate, and then the company continued to carry on the same business at the same place and under the same partnership name. Both deeds were executed September 27, 1856, and were delivered by the grantees to Doyle to be recorded. The deed to Bishop was properly acknowledged, and was recorded two days after the date, but the one to Updike was not acknowledged till the 2d of October following, and was not then recorded.

It was alleged by complainants that, although their mortgages were not recorded, Bishop and Updike, grantees in the deeds above referred to, had actual knowledge of their existence, and that they recognized and acknowledged the same as subsisting liens on the estate.

Three other deeds were made by Doyle; on the 21st of October, 1856, he mortgaged the remaining third of the said estate to William W. Bishop to secure \$16,207.21; on October 27th, same year, during the absence of Updike from the State, he deeded the same one third part to the Rhode Island Bleach and Cambric Works; and on the 6th of November following he quitclaimed to William W. Bishop all his interest in the whole of the estate. These were all recorded shortly after the date of their execution. Complainants' mortgages were not recorded until December 10, 1856; but it was alleged that the grantees of the two last-men-

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tioned deeds, viz. the corporation respondents and William W. Bishop, had actual knowledge of the complainants' mortgages at the time the three last-mentioned deeds were executed and delivered.

The grantees in these deeds were the only real parties who were contesting the priority of complainants' mortgages.

Thomas. A. Jenckes, for complainants.

William H. Potter and *Charles Hart*, for respondents.

CLIFFORD, J. Relief is sought against the respondent corporation and William W. Bishop solely upon the ground that they had actual knowledge of the complainants' mortgages; and that is the principal question in the case. Separate answers are filed by the contesting respondents, and it is very clear that the questions presented in the case of the respondent corporation are altogether different from those presented in the case of the other contesting party. Knowledge, whether actual, implied, or constructive, is explicitly and unqualifiedly denied by both in language as direct and unequivocal as could well be chosen, and in that respect the questions arising under the respective answers are the same; but it should be remembered that the third part claimed by the respondent corporation is the same third part as that embraced in the deed to Walter W. Updike, which was not recorded. Before this suit was brought, the said Walter W. Updike had commenced a suit in equity against Louis J. Doyle, William W. Bishop, Charles Jackson, and the same corporation respondents in the Supreme Court of the State. The prayer of the bill of complainant in that suit, among other things, was, that the aforesaid deed to the said respondent corporation might be declared void, and that the priority of his title to that third part of the said estate might be established. Respondents were duly served with process, and appeared, answered, and took proofs; and upon final hearing it was ordered, adjudged, and decreed that the corporation respondents and William W. Bishop had actual notice of the before-mentioned deed to Walter W. Updike, and that the deed to the corporation now under consideration was void, and of no effect as to the complainant in that suit. A supplemental bill of complaint was thereupon filed in

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this court setting up that decree. Parties made respondents therein appeared, and answers and replications were duly filed, and proofs taken, and final hearing had ; and I am of the opinion that the decree is final and conclusive between the parties, and that the immediate and direct effect of the decree is to establish the title to that third part of the estate in the said Walter W. Updike, both as against William W. Bishop and the respondent corporation. The contesting respondents in this case, therefore, have no title whatever to that third part of the said estate. Stopping there, however, it may be questionable whether any decree could be made in favor of the complainants ; but they go further, and introduce the deposition of Walter W. Updike, duly taken in this case, and he testifies that he saw the two mortgages of the complainants prior to the 1st of September, 1856, and that he had actual knowledge of the considerations therein expressed. Taken together, the decree of the Supreme Court of this State, and the uncontradicted testimony of Walter W. Updike, establish the right of the complainants to a decree in their favor in this case, so far as that third part of the estate is concerned. The controversy between William W. Bishop and the complainants as to the other two-third parts of the said estate remains to be considered. Answer of this respondent admits that the proposal and acceptance in writing, as exhibited in the record, were made and executed, and that one third of the said estate was, pursuant thereto, on the 27th of September, 1856, conveyed to him by deed of that date, as alleged in the bill of complaint. He also admits that there was a proposition for a copartnership, and that the articles of copartnership were duly executed as alleged ; but he absolutely denies that, by any one or all of these instruments, he ever in any manner became liable to the complainants or to any other person for the debts due from his grantor to the complainants, or that he had, at the time he took said deed, any notice or knowledge whatever of the before-mentioned mortgages of the complainants. Admission is also made by him that the same grantor, on the 21st of October, 1856, mortgaged to him another third part of the estate to secure a loan amounting, with interest, to the sum of sixteen thousand

two hundred dollars, but he avers that the same was made in good faith and for a valuable consideration, and without any knowledge or notice in any way of the pretended claim of the complainants, or of the alleged mortgages held by them on the said estate. Regarding the aforesaid deed and mortgage as standing substantially upon the same ground, so far as respects the evidence of notice, they will be considered together. Said mortgage deeds to the complainants were executed to secure certain acceptances and advances made by them at the request and for the benefit of the mortgagor; and it appears that the mortgagees agreed with the mortgagor, at the time of the execution of the mortgages, that they should not be recorded. They made that agreement at the request of the mortgagor, and in consideration thereof the mortgagor procured Walter W. Updike to give the complainants a written guaranty "to hold them harmless of all loss, cost, and expenses which may in any way accrue to them, their heirs, and assigns, by reason of their not recording said deeds of mortgage." Reference is made to the guaranty, as showing that the omission to record the mortgages in this case was not an oversight, or the result of accident, forgetfulness, or inadvertence, but that the respective transactions were intended to be kept secret, as is evident from the very terms of the written guaranty. Respondents contend that such an agreement is a fraud upon the registry law, and that the complainants, having accepted a written guaranty against loss for keeping the mortgages secret, are bound to look to their guarantor for redress, and that they cannot invoke the aid of a court of equity in their behalf in any matter pertaining to that agreement. Courts of equity might well refuse to enforce such an agreement, or to afford a party thereto any relief, who alleged that it had been broken; but it can hardly be admitted that proof that a complainant has entered into such an agreement in respect to an unrecorded deed, is a good defence on the part of the respondent, who has taken a subsequent deed of the same premises, with actual knowledge that the premises had been previously conveyed to another in good faith. Parties making such an agreement, it may well be held, are entitled to no favor as against a subsequent

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purchaser for a valuable consideration ; but it would be an encouragement to fraud to hold that the wrongful act of one party to a suit is a justification for another wrongful act on the part of the other party, of equal magnitude and immorality. Frauds are forbidden in equity, and when committed they cannot be set off one against another, but each separate transaction must stand or fall by itself. Actual notice is alleged in this case, and the party alleging it must prove it to the reasonable satisfaction of the court. Such a notice of a prior unrecorded deed, in order to be available to the party setting it up, must be so clearly proved as to make it fraudulent in the second purchaser to take and register a conveyance in prejudice to the known title of another ; and in weighing the evidence upon that subject, the circumstance that an agreement to keep the mortgages secret was made must necessarily be taken into the account, as diminishing the probability of the theory that the transaction became public. *M'Mechan v. Griffing*, 3 Pick. 149 ; *Jackson v. Sharp*, 9 Johns. 163 ; *Rogers v. Jones*, 8 N. H. 264 ; *Harris v. Arnold*, 1 R. I. 125 ; *Landes v. Brant*, 10 How. 348 ; *Marshall v. B. and O. R. R. Co.*, 16 How. 314 ; *Foot et al. v. Emerson*, 10 Vt. 344 ; *Pendleton v. Fay et als.*, 2 Paige Ch. R. 202 ; *Gray v. Hook*, 4 Comst. 449 ; *Porter v. Cole*, 4 Me. 20 ; *Jackson v. Valkenburg*, 8 Cow. 260. The evidence chiefly relied upon by the complainants to prove notice consists of the testimony of Louis J. Doyle, one of the respondents in the suit, and the grantor in all these deeds, and of the testimony of Henry C. Whitaker, the agent of the complainants, who procured the guaranty in their favor against loss for not recording the mortgages, and witnessed the signature of the guarantor. They also contend that a memorandum or short description of the advances and mortgages in question was entered by Louis J. Doyle in a " blotter " kept by him at the mill of the company at Newport, and that the respondents William W. Bishop and Charles Jackson saw the book and read the entry the last of September, 1856, during a visit they made there about that time. Referring to the witness Louis J. Doyle, it will be recollected that he is the grantor in the mortgages in question, and that he is the party for whose benefit the agreement was made to keep

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the transaction secret, and who furnished the guaranty to save the grantees harmless for not recording their deeds. He it is, also, who sold and conveyed one third part of the said estate to William W. Bishop for its value, and afterwards mortgaged another third part to the same person for a loan amounting to sixteen thousand two hundred dollars, and he it is, also, who conveyed the other third part twice, and now, when examined as a witness, undertakes to testify that all these parties had actual knowledge of the prior unrecorded mortgages to the complainants, although the latter, at his request and for his benefit, had agreed not to put them on record, and he had furnished them with a satisfactory guaranty to save them harmless against loss or expense in consequence of complying with his request. Besides, he made no such communication on the 6th of September, 1856, in the proposal for sale, and nothing of the kind was acknowledged or recognized in the written acceptance executed at the same time. His testimony upon the subject is quite cautious, and far from being satisfactory. Inquiry was made of him whether he had any conversation with William W. Bishop before he made the before-mentioned conveyance to the respondent corporation, and his answer is, that, as near as he could recollect, he did have a conversation with him on the 20th of October, 1856, concerning the contract between himself and the complainants, and the advances made by them and the mortgages given by him to them. To what mortgage or mortgages he refers he does not state, nor is it possible to ascertain from his testimony how near to the actual fact "as near as he can recollect" is; but it does appear that the time when the conversation took place, if at all, is a matter of very great importance, as on the 21st of October, 1856, the witness mortgaged the only remaining third part of the said estate he then owned to William W. Bishop, to secure a *bona fide* loan amounting to sixteen thousand two hundred dollars. The deed of mortgage to Bishop was executed on that day, and was duly recorded on the 29th of the same month. Notice should also be taken of the fact in this connection, that, on the 27th of the same October, he conveyed another third part of the said estate to the before-mentioned corporation, well know-

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ing that the same belonged to Walter W. Updike, to whom he himself had previously conveyed it. The witness admits that William W. Bishop inquired of him on that day who, if any one, had claims on the estate, and that he told him that there were no claims, except that of Walter W. Updike, arising out of his unrecorded deed, and the outstanding recorded mortgage of his own grantor, but he reiterates that he had previously, on the 20th of October, 1856, told him particularly of the mortgages of the complainants. Whitaker is also examined, and he testifies that he was present on the last-mentioned occasion, and that he heard the other witness tell William W. Bishop all the particulars in relation to the mortgages and other securities, and the disposal of the goods to be manufactured at the mill. Advances had been made by the complainants to the witness Louis J. Doyle, of about sixteen thousand dollars, and something more than ten thousand dollars remained unpaid when they took the two unrecorded mortgages. The arrangement between them and the witness was, that he, the witness, should make them his consignees of his manufactured goods, and that he was to give them the two mortgages in question, which were not to be recorded, and another of a different estate situate in North Providence, which was to be recorded. They therefore held under the same grantor a recorded mortgage, as well as the two which were unrecorded, and all three had respect to the same subject-matter. The recorded mortgage was specified in the proposal of sale, and it is there stated that the grantor therein obtained an advance of ten thousand dollars, for the security of which he gave a mortgage on his estate situate in North Providence, and that he put the capital into the concern; but he made no mention of the unrecorded mortgages, or of any other lien on the said estate, except the outstanding mortgage of his own grantor. Statement of the first witness is, that, just after his first conveyance to William W. Bishop, he, the grantee and Charles Jackson came to the mill and counting-room and examined the mills and books, and that the latter took the daybook, that is, the "blotter," in his hands and commenced at the beginning and read the entries aloud to the other party, and made comments on them in his

usual style. Theory of complainants is, that this meeting was on the 27th of October, 1856, which is the date of the deed to the before-mentioned corporation respondent. Assuming that to be true, it would then appear that the respondent then ascertained, unless he knew before, that the two-third parts of the estate conveyed to him, one-third part by an absolute conveyance and for its full value, and the other by a mortgage deed to secure a loan of sixteen thousand two hundred dollars, were subject to two unrecorded mortgages to the complainants; and that, instead of complaining of the attempt to defraud him, he proceeded to purchase, in the name of the company he represented, another third part of the same estate, well knowing that the title would be subject to those mortgages unless he and the other two persons present should all refuse to speak the truth. Such a theory is improbable, if not incredible, and must be fully proved before it can be adopted. Respondents examined Oliver P. Davis, who was the clerk of the before-mentioned respondent corporation, and he testified that Charles Jackson, on the 27th of October, 1856, asked Louis J. Doyle if there were any claims or encumbrances on the property he was about to sell, and that his reply was, that there were none whatever known to him, except the outstanding mortgage of his grantor. Twice he was interrogated upon that subject, and twice he answered in the same way, and without any qualification. They also examined Pardon Olney, who was the superintendent of the mill at Newport, and he testified that Louis J. Doyle came there on the 19th of November, 1856, and asked him, the witness, to let him have the keys of the safe where the books were kept, and the witness let him have the key, and he, the said Louis J. Doyle, took the book out of the safe and did some writing in it, but the witness does not know what it was. Argument for respondents is, that the memorandum now appearing in that book respecting the unrecorded mortgage or mortgages of the complainants was made at that time, and they exhibit the book and insist that its appearance establishes the theory that it was not made at the same time as the writing which stands in the same connection. The deposition of William W. Bishop is also introduced by respondents, that the first he heard of such mortgages was after the 1st and before the 6th of

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November, 1856, and he admits that he and Charles Jackson went to Newport in October, 1856, as alleged, and that they visited the mill and saw the blotter. Entries were then on the book, as he states, describing the four acceptances of twenty-five hundred dollars each, and also describing the four notes given in exchange for the same; but he states that he is positive there was then no entry on that book such as now appears respecting the unrecorded mortgages of the complainants. Asseverations equally explicit and unqualified are also made by Charles Jackson, whose deposition also was taken by the respondents. He says he is positive that Louis J. Doyle represented that there was no encumbrance on the property, except the mortgage to his own grantor, and he is fully confident that the disputed entry on the blotter was not there when he and the witness examined it. Pressed by the weight of this testimony, the complainants re-examine Louis J. Doyle, and he testifies that he does not recollect that he got the key of the safe as stated, but says he always had the keys. His account of the matter is, that some one handed him a note that he was discharged, and that he went to the room where the safe was, and made the last two entries on pages thirty-seven and thirty-eight of that same book, and he avers that he thinks William W. Bishop examined the books at the mill more than once. Suffice it to say, that I am of the opinion that the weight of the evidence clearly shows that the entry respecting the unrecorded mortgages was not on the blotter at the time the two witnesses of the respondents examined the book, and I am also of the opinion that the complainants fail to overcome the allegations in the answer of William W. Bishop, wherein he denies that he had knowledge or notice in any way of their unrecorded mortgages, either when his first deed or when his mortgage of the 21st of October, 1856, was made and recorded. On the other hand, I am of the opinion that he had actual knowledge of those unrecorded mortgages before the quitclaim deed to him of the 6th of November, 1856, was executed and delivered.

Decree for complainants in conformity to the opinion of the court, and unless the parties agree they will be heard as to the form of the decree.

MAINE DISTRICT.

SEPTEMBER TERM, 1860.

ALFRED BLANCHARD *et als.*, Libellants, v. THE BRIG MARTHA WASHINGTON, AMOS D. DOLLIVER *et als.*, Claimants.

By the act of December 31, 1792, the permanent register of every American vessel must issue from and be recorded in the office of the collector of the home port, which by law is defined to be the port at or nearest to which the owner, if there be but one, or if more than one, the husband, or acting, or managing owner, usually resides.

The office of the collector at the home port is the proper place for the registry of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, within the meaning of the act to provide for recording the conveyances of vessels and for other purposes.

The provisions of the act of Congress of July 29, 1850, concerning the registry of vessels, is constitutional and valid.

THIS was an admiralty appeal. The libel was filed to try the title to one-fourth part of the brig Martha Washington. Answers were made by William Anderson as master and part owner, by Phebe J. Flood, Amos D. Dolliver, George H. Coggins, Jacob Anderson, and Ferdinand McFarland. The libellants claimed to own five eighths of the brig; but according to the answers they owned but six sixteenths at the time of filing the libel; and the rest was owned as follows: three sixteenths by Phebe J. Flood, two sixteenths by Joseph H. Perley, one sixteenth by William Anderson, one sixteenth by George H. Coggins, one sixteenth by Jacob Anderson, one sixteenth by Ferdinand McFarland, and one sixteenth by Amos Dolliver. Libellants contested the four sixteenths claimed by Flood and Dolliver, but the District Court entered a decree for respondents. The case was submitted in the court upon an agreed statement of facts as follows:—

It is admitted that the brig was built at Surrey, in the collection district of Frenchman's Bay, State and District of Maine, in the year 1853; that at that time, and on the 5th of December, 1853, the majority in interest of the owners resided in Trenton and

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Surrey, within said collection district; that on that day she was permanently registered at the custom-house in said district; that on the 25th of October, 1855, the majority in interest of the owners still resided as aforesaid; that on that day her register was surrendered, and she was permanently enrolled in said custom-house, enrolment No. 60; that at that time the libellants were owners of two tenths; William Coggins, then living at Surrey, since deceased, owned one half, William Anderson three sixteenths, and George H. Coggins, Jacob Anderson, and Ferdinand McFarland, one sixteenth each, of said brig; that on the 7th of December, 1855, the said brig being at Norfolk, and no one of the owners, except the said William Anderson, her master, being there, he being the owner, at that time, of three sixteenths, and desiring to proceed on a voyage to the West Indies, she was temporarily registered in the town of Norfolk, within and for the collection district of Norfolk and Portsmouth, as appears by the copy of the register, which makes part of the case; and said brig continued to sail under said register during the whole of the year 1856, and most of the year 1857; that on the 27th of March, 1856, the said William Coggins, then living, and a resident of Surrey, aforesaid, conveyed to the said Phebe J. Flood, by mortgage bill of sale, three sixteenths of said brig, which bill of sale was, on the 1st of April, 1856, recorded at the custom-house at Ellsworth, in the collection district of Frenchman's Bay; that on or about the 1st of September, 1856, the said Coggins conveyed to the said Amos D. Dolliver, by mortgage bill of sale, one-sixteenth part of said brig, which bill of sale was, on the 2d of said September, duly recorded at the custom-house at Ellsworth, in the collection district of Frenchman's Bay; that on the 21st of November, 1856, the said William Coggins, then a resident of Surrey, where he continued to reside till his death, conveyed to the libellants, by mortgage bill of sale, four-eighths parts of said brig, which bill of sale was duly recorded on the 27th of the same November, at Ellsworth, in the collection district of Frenchman's Bay; also, on the 11th of May, 1857, at Norfolk, in the collection district of Norfolk and Portsmouth; also, on the 18th of November, 1857, by the clerk of the town of

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Surrey, in the records of mortgages of that town, but after the decease of said Coggins.

All the mortgages, enrolments, and registers make a part of the case, but need not be copied. It is agreed that none of the mortgages have been paid, and that they had all become fully foreclosed at the time of filing the libel, so as to vest the title absolutely in the several mortgagees; also, that the two mortgages to the said Phebe J. Flood and Amos D. Dolliver were never recorded by the town clerk of Surrey, in the records of mortgages of that town.

Failing to show that the libellants had actual notice of the transfer, as was alleged in the answer, the claimants insisted that the libellants had constructive notice of the same; because, they insisted, the bills of sale to them were duly and properly recorded at the custom-house in the district comprehending the port to which the vessel belonged. To this the libellants replied, first, that the custom-house at Norfolk, in the State of Virginia, and not the one at Ellsworth, was the proper place for recording the respective bills of sale, and inasmuch as the claimants' bills of sale were not recorded at Norfolk, the registry was a nullity and inoperative as a constructive notice of the conveyance; second, that the act of Congress of July 29, 1850, 9 Stat. at Large, 440, is unconstitutional and void, and that their title to the four sixteenths was valid, because their bill of sale was duly recorded, pursuant to the State law, in the office of the town clerk where the mortgagor resided when the instrument was executed.

Fessenden and *Butler*, proctors for libellants.

Shepley and *Dana*, proctors for Dolliver and Flood.

CLIFFORD, J. In considering the first question, which is purely one of construction, it must be assumed that the act of Congress under consideration is valid and obligatory. Referring to the first section of the act, it will be seen that it provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of

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the customs where such vessel is registered or enrolled. Relying upon the closing paragraph of the section, the libellants insist that the respective mortgages of the claimants were not duly recorded according to that provision; that the proper office for registering the same was that of the collector of Norfolk, from which the temporary register of the vessel issued, and not that of the collector at Frenchman's Bay, where the vessel was built, originally registered, and permanently enrolled. On the other hand, the claimants insist that by the true construction of the provision, the registry of every such transfer must always be made at the custom-house of the home port of the vessel where the permanent register or enrolment was obtained. Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner usually resides. 1 Stat. at Large, 288. Permanent registry, therefore, as manifestly appears by that provision, is required to be made at the home port of the vessel, and what is meant by the home port is clearly and plainly defined. That requirement is also accompanied by another, which it becomes important to notice in this connection, and which is scarcely less significant than the one just recited. Registry must be made at the home port; and the same section provides that the name of the ship or vessel, and of the port to which "she shall so belong," shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and the owner or owners are made liable to a penalty of fifty dollars for neglecting to comply with that requirement. All persons interested, therefore, have the means of ascertaining the name of the vessel and her home port; and her shipping-papers, which include a copy of her register or enrolment, are by law required to furnish the same information. Matters requisite to the registering of any ship or vessel are required to be recorded, and for that purpose the collector of the district comprehending the port to which the ship or vessel belongs is re-

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quired to keep in some proper book a record or registry thereof, and to grant an abstract or certificate of the same according to the form prescribed in the ninth section of the act. Other provisions also of the same act show that every ship or vessel has a home port, and that all persons interested are by law referred to that port for their permanent registers or enrolments. Citizens of the United States may become the owners of a ship or vessel entitled to be registered, while the vessel is in a district other than the one where the purchaser usually resides, and in that contingency it is provided, by the eleventh section of the act, that such ship or vessel shall be entitled to be registered by the collector of the district where she may be at the time of the conveyance; but in that event it is provided that whenever such ship or vessel shall arrive within the district comprehending the port to which she "shall belong," the certificate of registry which shall have been obtained as aforesaid shall be delivered up to the collector of such district, who, upon the requisitions of this act, in order to the registry of ships or vessels being duly complied with, shall grant a new one in lieu of the first, and the certificate so delivered up shall forthwith be returned by the collector who shall receive the same to the collector who shall have granted it. These references to the act of the 31st of December, 1792, are believed to be amply sufficient to show that every ship or vessel of the United States has a home port, and that her permanent register must issue from, and be recorded in, the office of the collector of such home port, which by law is defined to be the port at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner, usually resides. Regulations to the same effect are prescribed by the act of the 18th of February, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries. 1 Stat. at Large, 305. By the first section of that act it is provided in effect that, in order for the enrolment of any ship or vessel, she must possess the same qualifications as are made necessary for registering the same, and the same requisites must in all respects be complied with as on application for a register. Every licensed ship or vessel also is required to have her name

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and the port to which she belongs painted on her stern, in the manner as is provided for registered ships or vessels; and if any licensed ship or vessel be found without such painting, the owner or owners thereof are made liable to a fine of twenty dollars. Sec. 11, p. 309. Collectors of the several districts are authorized by the third section of the act to enroll and license any ship or vessel that may be registered, upon such registry being given up, or to register any ship or vessel that may be enrolled, upon such enrolment and license being given up as therein required. Undoubtedly these reciprocal changes may be made upon the application of the master or commander, when the ship or vessel is in a district other than the one to which she belongs; but in every such case, the master or commander is required to make oath that, according to his best knowledge and belief, the property of the vessel remains as expressed in the register or enrolment proposed to be given up. Whenever such exchanges are made, it becomes the duty of the collector making the same to transmit the register or enrolment given up to him to the Register of the Treasury; and the same section provides that the one granted in lieu of the one given up shall within ten days after the arrival of such ship or vessel within the district to which she belongs be delivered to the collector of said district, and be by him cancelled; and the master or commander is made liable to a penalty of one hundred dollars if he shall neglect to deliver the register or enrolment and license as therein required. Registers or enrolments granted under that provision are temporary in their operation, and consequently are so denominated as contradistinguished from those granted at the office of the collector of the district where the ship or vessel belongs. Change of ownership, where the new owners reside in a district other than the one in which the former owners resided, or a majority in interest of the vessel, will authorize a corresponding change of the home port, and of the permanent register or enrolment; but in that case, if the ship or vessel has undergone no alteration in burden since her last registry, it will not be necessary to produce the certificate of a master carpenter, or the surveyor's certificate of admeasurement. When application for the new certificate of regis-

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try is made, the former certificate must be surrendered to the collector to whom the application for such new registry is made, and be by him transmitted to the register of the treasury for cancellation; and it is expressly required that the new certificate of registry shall refer to the prior certificate for the admeasurement of such ship or vessel. 1 Stat. at Large, § 14, p. 294; Reg. Rev. Laws, pp. 17 and 18; 1 Stat. at Large, p. 498. Corresponding change, of course, must be made in the name of the port to which the ship or vessel belongs, as painted on the stern of the vessel; but the name of the vessel cannot be changed, under existing laws, without an act of Congress. 11 Stat. at Large, p. 375. Reference is made to these provisions as showing that ships or vessels once documented as vessels of the United States never cease to have a home port while they retain their character as American vessels. Whether sailing under the permanent register, issued from the office of the collector of the home port, or under a temporary document issued from the office of the collector of some other district in the course of the voyage, every such ship or vessel bears upon her stern the name of the port to which she belongs; and although sailing under such temporary document, still it recites the name of her home port, and expressly refers to the permanent register or enrolment, reciting all the material facts upon which the latter was founded. Permanent registers are very properly defined in the treasury regulations as being those granted by collectors to ships and vessels belonging to ports within their respective districts; and, by the same authority, temporary registers are defined to be those granted by collectors to ships and vessels belonging to ports in other districts. Practically, the one is distinguished from the other by the word "permanent" or "temporary," according to the fact, being written on the margin of the document immediately above the number, but they may also be readily distinguished by their material recitals; the former is founded either upon the certificate of the master carpenter, and that of the surveyor, or upon the representation of a change in the ownership of the vessel, and in the residence of the owners; while the latter is uniformly founded upon the former certificate and the suppletory

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oath of the master or commander, certifying, among other things, that the vessel is bound on a voyage which necessarily calls for a change of the documents. Such temporary certificates always give the name of the vessel and the name of the port to which she belongs, and clearly they are, in contemplation of law, but temporary substitutes for the permanent documents. No better illustration of the proceeding can be found than is furnished by the papers in this case. Desiring to change the employment of the vessel and go on a foreign voyage, the master made and filed in the office of the collector for the District of Norfolk and Portsmouth the requisite oath to enable him without returning to the home port of the vessel to obtain a register in lieu of the enrolment under which she was sailing at the time of the application. Accordingly he made and subscribed an oath, stating the names of the owners, the proportion owned by each, the name of the place where and the time when she was built, the port to which she belonged, and that she was bound on a foreign voyage, and referred to her permanent enrolment to confirm his statements. Having made oath to those facts, and given the bond required by law, the temporary register was issued by the collector, and it was clearly but a temporary substitute for the permanent enrolment which was surrendered. Documents of permanent character are granted to ships and vessels built or owned by citizens of the United States, to confer upon them the character of American vessels, and to secure to their owners the benefits and privileges belonging to vessels entitled to that designation. Temporary registers or enrolments are authorized by law in the course of the voyage at the ports of districts other than the one where the vessel belongs, as matter of convenience to the owners, to save the loss of time and the expense which must otherwise be incurred by a return of the vessel to her home port merely for the purpose of changing her papers. Permanent documents, whether registers or enrolments, are uniformly granted at the home port, but temporary ones are never granted, except when the vessel is in the port of a district other than the one to which she belongs; and hence the requirement that the former shall be recorded in some proper book to be kept by the

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collector granting the same. No such requirement is made in regard to the latter, but the provision is, that the collector to whom the register or enrolment and license may be given up shall transmit the same to the register of the treasury, and the register or enrolment and license granted in lieu thereof shall, within ten days after the arrival of the vessel within the district to which she belongs, be delivered to the collector of said district and be by him cancelled. Registry of bills of sale of ships or vessels surely need not be recorded in more than one office, and the unbroken practice of seventy years points to the office of the collector of the home port as the proper place for such registry, and consequently as the one contemplated by the act of Congress under consideration. Every ship or vessel regularly documented is registered or enrolled at the port of the district where she belongs; and that remark is correct, although she may be sailing under a temporary register or enrolment granted at the office of the collector of some other port. Such a temporary document always refers to the permanent one, and is founded upon it, and indeed would be of no validity if the permanent one did not exist. Confirmation of this construction is derived from the language of the second section of the act. Collectors of customs are required by the second section to record the bills of sale, mortgages, hypothecations, and conveyances mentioned in the first section; and also all certificates for discharging and cancelling any such conveyance, in a book to be kept for that purpose, in the order of their reception. They are also required to note in said book, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received, and certify on the instrument of conveyance, or certificate of discharge or cancellation, the number of the book, and the page where recorded. 9 Stat. at Large, p. 440. Notice, undoubtedly, is one of the objects of these requirements, in order to prevent fraud upon subsequent purchasers or encumbrancers.

But let it be conceded that the views of the libellants are correct, and it at once becomes obvious that the requirements are substantially useless; a compliance with them would seldom or never accomplish the object for which they were enacted. Ships

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or vessels absent from the home port may change their papers at any other one of the hundred and fifty custom-houses established under the revenue laws of the United States. Such changes occur of course while the vessel is absent from the port of the district to which she belongs, and in many instances without the knowledge of those owning a majority in interest of the vessel. Purchasers, under such circumstances, would hardly find it practicable to make search at all the custom-houses in the United States in order to learn the state of the vessel's papers, and unless they did so the dishonest vendor, on the theory of the libellants, might easily secure the fruits of a second sale. Congress, it is believed, could not have intended to adopt any such theory; and, in view of all the provisions of law upon the subject, I am of the opinion that the office of the collector at the home port is the proper place for the registry of any such bill of sale, mortgage, hypothecation, or conveyance, within the meaning of the act to provide for recording the conveyances of vessels, and for other purposes.

Congress, by the express words of the Constitution, has power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Able counsel maintained in *Gibbons v. Ogden*, 9 Wheat. 3, that the power of Congress in this behalf was limited to the interchange of commodities, and that it did not comprehend navigation. Responding to the argument on that point, Marshall, Ch. J., said, if commerce does not include navigation, the government of the United States has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen; yet this power has been exercised with the consent of all from the commencement of the government, and has been understood by all to be a commercial regulation. All America, says the late Chief Justice, understands and has uniformly understood the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed; and finally, he affirms that the power to regulate navigation is as expressly granted as if that term had been added to the word

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“commerce.” But the case of *Sinnott et al. v. Davenport*, 22 How. 242, is more directly in point, and perhaps ought to be considered as decisive of the question. On that occasion the court had under consideration the question, whether the law of the State of Alabama requiring owners of steamboats navigating the waters of the State to file in the probate office of the county of Mobile a statement specifying the name of the vessel, the name of the owner or owners, his or their place of residence, and the proportion owned by each, was or not constitutional; and the court unanimously held that it was not, because it was in conflict with the law of Congress providing for the registering and enrolling of vessels. Speaking directly upon the question involved in the case, the court say: “Congress, therefore, has legislated upon the very subject which the State law has undertaken to regulate, and has limited its regulations *in the matter to a registry at the home port.*” That opinion was given in 1859, more than eight years after the act of Congress in question was passed. Undoubtedly the means of ascertaining the names and citizenship of the owners of ships and vessels, and of perpetuating and authenticating the evidence thereof, are regulations of commerce within the meaning of that term, as defined by the decisions of the Supreme Court; and if so, then it clearly follows that the regulations of Congress are paramount to those enacted by the State.

For these reasons, I am of the opinion that the act of Congress under consideration is valid, and consequently that the decree of the District Court must be affirmed.

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JOHN BUCKLEY, JR., v. RUFUS K. PAGE et al.

Under the 195th chapter of the laws of Maine, approved March 24, 1835, for the relief of poor debtors, if a debtor arrested on execution select one of two disinterested justices of the peace and of the quorum himself, and if the other was selected by the officer at the request of the debtor, it is a substantial compliance with the requirements of the act, and the selection must be considered as the act of the debtor himself.

When such justices have jurisdiction, their certificate, required by the statute, that the debtor has caused the creditor to be duly notified according to law, is conclusive, the statute making them the judges of the regularity of the preliminary proceedings, and, in the absence of fraud, other evidence to control the adjudication of the justices is not admissible.

THIS was an action of debt on a poor debtor's bond, dated the 26th of November, 1859. A verdict for the plaintiff was taken at the preceding term, subject to the opinion of the court upon the questions of law raised at the trial, but reserving the right to either party, after the opinion, to turn the case into a bill of exceptions. The writ was dated the 20th of July, 1858, and defendants appeared and pleaded performance. The plaintiff introduced the bond on which the suit was brought. The condition of the bond was, that, if the first-named defendant shall, in six months from the time of executing the same, cite the creditor before two justices of the peace, *quorum unus*, and submit himself to examination agreeably to the one hundred and ninety-fifth chapter of the laws of Maine, approved March 24, 1835, and take the oath or affirmation provided in the seventh section of the two hundred and forty-fifth chapter of the laws of the State, or pay the debt, interest, costs, and fees on the execution, or be delivered into the custody of the jailer, agreeably to the eighth section of the first-named statute, then the obligation to be void, otherwise to remain in full force. Two certificates of discharge were offered in evidence by the defendants, to prove performance of the conditions of the bond. The plaintiff objected to the reading of

those certificates upon the ground that they were not admissible, unless it was first shown by other evidence than the certificates that the justices granting and signing the same had jurisdiction of the subject-matter, but the court overruled the objection, and the certificates were read to the jury. One was granted the 25th of December, 1857, and the other April 12, 1858. Both were signed by James L. Child and Edward Fenno, and recited that the subscribers thereto were two disinterested justices of the peace and of the quorum, for the county of Kennebec, and in all other respects were in the usual form, reciting, in substance, that the first-named defendant, a poor debtor arrested on an execution issued on a judgment therein described, but enlarged on giving bond to the creditor, had caused the creditor to be notified according to law of his desire of taking the benefit of the oath prescribed by law for the relief of poor debtors; that he appeared at the time and place therein mentioned, submitted himself to examination, and, after being duly cautioned, took before them the oath prescribed in the law of the State, approved April 2, 1836; and it was further recited in the first-named certificate that the debtor, at the same time and place, also took the oath prescribed in the twenty-eighth chapter of the Revised Statutes of Maine, approved October 2, 1840. As rebutting testimony, the plaintiff offered the records of the justices who granted the respective certificates of discharge relied upon by the defendants. Among other things, it was certified in such record that one of the justices was chosen by the debtor, and that the other was chosen by a deputy marshal at the request of the debtor, the creditor not being present by himself or his attorney, and neglecting to choose. Appended to the records was a copy of the respective notices which the debtor gave to the creditor before making his disclosure, from which it appeared that he made complaint in both instances to a justice of the peace for Kennebec County, and not to the jailer, as required by the ninth section of the act under which the bond was given. By that statute the debtor was authorized to make the complaint to the prison-keeper, setting forth that he had not sufficient estate to support him in prison, and thereupon it is made the duty of the keeper

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to apply to a justice of the peace of the county, who shall make out a notification, under his hand and seal, to the creditor of the prisoner's desire to take the benefit of the oath or affirmation prescribed by that act. But the same records certified that the debtor gave due notice to the creditor of his intention to take the benefit of the oath or affirmation, and that he appeared before the justices, submitted himself to examination, and that the prescribed oath was administered to him according to law, as stated in the certificates introduced by the defendants. Defendants objected to the admission of the records, insisting that the adjudication of the justices as to the sufficiency of the notice, as shown by the certificates of discharge, was conclusive, but the court overruled the objection, and the records were read to the jury. At this stage of the trial it was agreed that the defendants could prove that the debtor had no property at the times when the oaths were administered by the justices; and that if that evidence was by law admissible upon the subject of damages, then the verdict must be set aside, and a new trial granted. Under the direction of the court, the jury returned their verdict in favor of the plaintiff.

John Rand, for plaintiff.

George Evans, for defendants.

CLIFFORD, J. Two principal objections were taken by the plaintiff to the proceedings before the justices. He insists, in the first place, that the justices were not regularly chosen, and consequently that they had no jurisdiction of the subject-matter, as shown by the certificates of discharge. Any two disinterested justices of the peace and of the quorum of the county were authorized by the tenth section of that act to examine the notification and return at the time and place of caption, and, if regular and in due form, "may hear, and, if requested, take in writing the disclosure of the debtor." They are to proceed as is provided in the fourth section of the act; and if, upon the whole examination, they are satisfied that the debtor's disclosure is true, they are authorized to proceed to administer to him the prescribed oath or affirmation. By the fourth section of the act it is provided that the justices are to be selected by the debtor;

and it is insisted by the plaintiff that the justices in this case had not jurisdiction of the subject-matter, because it appears by the record of their proceedings that one of their number was chosen by the deputy marshal at the request of the debtor. Two answers are made by the defendants to this objection. First, it is insisted that the record was improperly admitted, because the certificates of discharge were conclusive evidence that the oath had been properly administered; and, secondly, that if it was admissible, still it appears that the justices were properly selected. It is not denied that one was properly selected, and I am of the opinion that the other, according to the statement of the record, was selected in substantial compliance with the statute. Under that act, any two disinterested justices of the peace and of the quorum of the county might be selected by the debtor; and it could not injuriously affect the rights of the plaintiff that one of them was selected by the officer at the request of the debtor, provided the justice so selected was of the proper county and disinterested. In making the selection, the officer acted for the debtor, and the selection, when made, must be considered as the act of the debtor himself. He was present and made a written disclosure, and took the several oaths specified in the certificates, as appears by the records, and of course adopted the act of the officer in making the selection which was made by his request. For these reasons, I am of the opinion that the objection to the jurisdiction of the justices cannot be sustained. Having come to this conclusion, it is unnecessary to consider the other ground assumed by the defendants on this branch of the case.

It is contended by the plaintiff, in the second place, that the notices given by the debtor to the creditor were illegal and insufficient. On the part of the defendants, it is insisted that it was the duty of the justices to examine the notification and return, and that their adjudication that the notice was in due form and according to law is conclusive of the fact, and cannot be contradicted by the plaintiff. Similar questions have often been presented to the Supreme Court of the State, and, inasmuch as the question involves the construction of a State law, those decisions constitute the rule of decision in this case, provided

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they announce a certain and settled construction applicable to the precise state of facts exhibited in the record. It was supposed at the argument that there was some inconsistency in the decisions of the State court ; but after a careful examination of the numerous cases referred to, no such inconsistency is apparent. Beyond question, the only mode of citing the creditor under the statute in question is by a notification from a justice of the peace, issued on the complaint of the debtor to the prison-keeper, and on the application of the prison-keeper to the magistrate, and where it appears, by an agreed statement of facts, or by evidence admitted without objection, that the only notice to the creditor was issued by a justice of the peace on the application of the debtor without any application from the prisoner to the keeper of the jail, the justices have no jurisdiction of the subject-matter, or power to administer the necessary oath or affirmation, and their doings are consequently illegal and void. *Knight v. Norton et al.*, 15 Me. 337 ; *Neal v. Ford et al.*, 21 Me. 440. Prior to the first-named case, it had been held in *Agry v. Betts et al.*, 12 Me. 415, that, under the act of 1822, it was within the judicial discretion of the justices to examine and pass upon the sufficiency of the return, and that such discretion was intrusted to them by law for their definitive determination. Acting upon the general and well-settled principle, that a matter which has once been determined by a court of competent jurisdiction is no longer an open question, except upon appeal, where it exists, or in some of the modes provided by law, the court say, we are satisfied that the court of the two justices was in the exercise of their proper jurisdiction when they passed upon the sufficiency of the return in question. Objection was made in that case to the admission of the certificate of discharge and to its sufficiency ; but the court admitted the certificate, and ruled that it was a full and sufficient defence to the action, and the plaintiff excepted. Subsequently the same question was again presented in *Black v. Ballard et al.*, 13 Me. 240 ; and the court expressly ruled that the certificate of the justices, that the creditor was notified according to law, must be received as conclusive evidence of that fact. Both of these decisions, however, preceded the case of *Knight v. Norton et al.* ; and

it was supposed at the argument that they were at least shaken, if not overruled, by the latter case. But the court still held in *Ware v. Ash et al.*, 16 Me. 386, that the adjudication of the justices, that notice had been given to the creditor according to law, was decisive of the sufficiency of the notice, and based their conclusion on the authority of *Agry v. Betts et al.*, 12 Me. 415. That case was followed by *Hanson v. Dyer*, 17 Me. 98, where it was contended by the counsel of the plaintiff that the decision in *Agry v. Betts et al.* had been varied or overruled. To that suggestion the court responded in very emphatic terms, denying the proposition, and showing that, in *Knight v. Norton et al.*, it appeared by the agreed statement that none of the preliminary proceedings had been in conformity to the statute. Among other things, the court say the two cases were decided upon facts and principles wholly different, and it is not now perceived how a decision could have been differently made consistent with the first principles of jurisprudence. During the same circuit the question was again presented to the court in the case of *Churchill v. Hatch*, 17 Me. 412; and the same court again affirmed the doctrine laid down in *Agry v. Betts et al.*, that where it appears that the justices had jurisdiction of the subject-matter, their certificate that notice was duly given is conclusive. Where the certificate is regular in form, it is *prima facie* evidence of jurisdiction, and throws the burden upon the plaintiff to show that jurisdiction did not exist. *Granite Bank v. Treat et al.*, 18 Me. 340. Nothing is offered, in this case, to show a want of jurisdiction, except what appears in the record, as to the selection of the justices and the supposed defect of notice; and I am of the opinion that neither of those objections can avail the plaintiff. As it seems to this court, the first is entirely without merit; and in regard to the second, repeated decisions of the State court, in addition to those already mentioned, have determined that the adjudication of the justices is conclusive. *Colby et al. v. Moody et al.*, 19 Me. 111; *Brown v. Watson et al.*, 19 Me. 452. Technical as the distinction is between the leading cases, it is, nevertheless, one which has been clearly recognized and carefully observed by the Supreme Court of the State through a

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long period and in a series of decisions which leave no doubt as to the law as understood in the local tribunal ; and there is nothing in *Neal v. Ford et al.*, 21 Me. 440, inconsistent in the slightest degree with that view of the question. In that case, the citation to the creditor was introduced by the plaintiff without objection on the part of the defendants, and consequently the case, in the view of the court deciding it, fell within the principle laid down in *Knight v. Norton et al.*, where the defect of notice was recited in the agreed statement. It is true that the decision in *Agry v. Betts et al.* was made in a case arising under the statute of 1822 ; but the Supreme Court of the State has expressly announced that they recognize no substantial difference between the statutes of 1822 and that of 1835. Like the former, the latter gives to the justices jurisdiction and power to examine the notification and return, and this, say the court, necessarily confers the power to decide upon their correctness. They examine with a view to decide, and their decision upon the point is made a part of their certificate. *Carey v. Osgood*, 18 Me. 154. When the tribunal composed of the two justices appears to have been duly organized, so as to acquire jurisdiction of the case, Shepley, J., says its judgment, as contained in the certificate, declaring that the debtor hath caused the creditor to be notified according to law, is conclusive, and evidence proposed with a view to control it is not legally admissible. *Baker v. Holmes et al.*, 27 Me. 154. Much of the misapprehension upon the subject has arisen from the fact that the distinction between the case of *Agry v. Betts et al.* and that of *Knight v. Norton et al.* was not very satisfactorily explained in the decisions that immediately followed the latter case. Later decisions, however, have supplied that deficiency, and afford a perfect solution of the difficulty. *Clement v. Wyman*, 31 Me. 54 ; *Low v. Dore et al.*, 32 Me. 27. Referring to the various acts of the legislature for the relief of poor debtors, Shepley, J., says in *Neal v. Paine*, 35 Me. 160, that it has long been the established construction of those statutes, that the justices are made the judges of the regularity of the preliminary proceedings ; that their judgment, as exhibited in their certificate, is conclusive ; and that no testimony

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can be legally admitted to prove their judgment to have been incorrect. To the same effect also is the case of *Pike v. Hariman et al.*, 39 Me. 53, where the same learned judge, after remarking that the justices must have decided upon the sufficiency of the notice before they proceeded to take the disclosure and administer the oath, says it has been uniformly held that their decision was conclusive upon the sufficiency of the notice, by virtue of the provisions of the statutes under which they have acted, unless in cases where all the facts have been submitted to the consideration of the court by an agreed statement. Without any further examination of decided cases, suffice it to say that I am of the opinion, as well from the language of the act under which these proceedings took place as from the authorities, that the adjudication of the justices, as contained in the respective certificates of discharge, that the debtor notified the creditor according to law, is conclusive of that fact, and that, in the absence of fraud, other evidence to control the adjudication of the justices is not legally admissible. *Baker v. Holmes et al.*, 27 Me. 155. According to the agreement of the parties, the verdict must be set aside, and a new trial granted.

MASSACHUSETTS DISTRICT.

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HUGH N. CAMP *et als.*, Libellants, v. THE SHIP MARCELLUS,
JOHN A. BAXTER *et als.*, Claimants and Appellants.

Under the English statute, which declares owners not to be liable for loss or damage occasioned by the neglect or incompetency of any licensed pilot in charge of the vessel, it was formerly held, if there was neglect in the management of a vessel, and a pilot was on board, the neglect was, *prima facie*, attributable to him; but the rule is now settled, that in order to bring their case within the statute, the burden is on the owners to show the pilot alone in fault.

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Vessels, whether going in or coming out of a harbor, are not, by the laws of Massachusetts, positively bound to employ a pilot.

While on board, in the absence of the master, the pilot has exclusive control of the navigation of the vessel; but if the master is present, his authority is not so far superseded by the pilot's power that he cannot interfere in case of gross ignorance or palpable and dangerous mistake.

Parties who suffer by a collision are entitled to have their remedy against the vessel occasioning the damage, and are not under the necessity of looking to the pilot for compensation.

APPEAL in admiralty. The pleadings disclosed the following facts: On the 27th of September, 1859, about seven o'clock in the evening, a collision occurred at the Narrows, in Boston Harbor, between the ship Marcellus, returning from a voyage to Singapore, and the schooner Empire, laden with sugar, and bound on a voyage to Bristol, in the State of Rhode Island. The schooner was struck on the larboard side, a little aft of midships, and shortly afterwards sunk.

Recovery was claimed by the libellants, the owners of the cargo, for the loss of the sugar, and the expense of saving the same, over the net proceeds of its sale.

The libel alleged that the schooner, just previous to the collision, was sailing on the western side of the channel, close hauled on the wind, with her starboard tacks aboard, the wind south-southwest; that she was steering southeast by south, and working up to the wind, in order to give the ship as much room as possible; that the ship was sailing up the channel, with the wind free, so that she might have passed the schooner on the larboard side without difficulty; as the ship approached towards the point of danger, the schooner hailed her to keep off, and was answered by the request to luff, which, as she was already close to the wind, was impossible; that the schooner did not change her course, but the ship, immediately after she hailed the schooner, luffed and instantly ran into the schooner, and presently both vessels drifted to the leeward shore.

The answer alleged the collision to have taken place on the easterly side of the channel; that the wind was southwest; the ship sailing along the leeward edge of the channel, and hugging the shore as close as she could with safety; that while so sailing, the schooner was discovered coming down the harbor, with a free

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wind, appearing at first to be going to the windward of the ship, as she might have done, but afterwards changing her course as if going to leeward, she approached within a short distance of the ship, luffed across her bow, causing the collision, which sunk the schooner and damaged the hull, rigging, and spars of the ship, for which the respondents prayed to be allowed.

A decree was entered in the District Court in favor of the libellants, whereupon the respondents appealed. After the appeal, the respondents filed an amendment to the answer, alleging the ship to have been, at the time of the collision, under the control of a pilot, who was alone responsible for any fault in her navigation.

C. T. Russell and T. H. Russell, for libellants.

B. R. Curtis and H. Scudder, for claimants.

CLIFFORD, J. Much additional testimony has been taken since the trial in the District Court, but it is not of a character to relieve the cause from the embarrassment which surrounded it in the court below, arising from the conflicting statements of the witnesses. Some of the circumstances, however, preceding the collision, are placed beyond the reach of doubt; and as they will aid in the solution of others more complicated by such conflicting statements, attention will first be given to such as substantially run clear of that difficulty.

According to the testimony of the master of the schooner, after she passed Nix's Mate, so called, "he luffed to, hauled the sheets flat aft and filled away." He states positively that he then looked at the compass, and that the schooner at that time headed southeast by south. All the witnesses who have any experience upon the subject, and whose opinions are worth considering, agree that what he says he did is precisely what he ought to have done in that situation. Assuming that his statement is reliable, then the schooner at that time and place was heading in a right direction to conform to the usages of the navigation, as appears by the concurrent testimony of every experienced witness in the case. Vessels going down the harbor, whether the wind is southwest or south-southwest, usually take the windward side of the channel in passing through the Narrows, and those coming

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up, as a general rule, are expected to take the leeward side under the same circumstances. As the schooner rounded the point, and before she was put upon the new course, she ran as near the land, according to the testimony of the mate, as the wind would allow her to do; and both the master and the mate testify that when she was put upon the course of southeast by south, she had the wind south-southwest, and was sailing as close to the wind as she would lay and fill her sails.

Considerable discrepancy exists in the testimony as to the course of the wind. Several witnesses examined by the respondents testify, some positively and others with more or less qualification, that the wind was southwest. Others admit that it was south-southwest a short time previous to the collision, but professed to think that it had changed before the collision occurred, which needs confirmation. Looking at the whole evidence, the better opinion is in favor of the theory assumed by the libellants.

None of the other facts embraced in this statement appear to be seriously controverted, except that one witness examined by the respondents says, if the wind and course of the vessel were such as stated by the master, and the schooner had been kept up to the wind during the passage down, she would have come in contact with the land on the windward shore. But that would depend so much upon the distance she was to the leeward when the course was taken, and upon the imperfectly ascertained fact how near she would lay to the wind, that the mere opinion of a single witness is not entitled to much weight. If she would not lay within less than six points, then it is believed that no such consequence would have followed, whether the wind was southwest or south-southwest; and even if she could be made to lay within five points, which is pretty close for an ordinary schooner, still it is scarcely probable that she was held constantly up to her utmost capability in that behalf.

Besides, it is insisted by the respondents that the true course of the schooner through the Narrows was southeast by south, which is the exact course on which she was put by the master. Men of intelligence do not ordinarily depart from a known regulation, calculated to promote their own safety, without some

motive of interest or convenience. Beyond doubt the master was well acquainted with the navigation, having sailed through the Narrows, as the channel is called, sixteen times a year, on an average, for twenty-one years. Daylight was not entirely gone, when he set the course of the vessel, and he had good weather and only a fresh breeze as the vessel advanced under that course. Nothing short of wilful default, therefore, could have prevented him from putting the vessel on the usual course, as it was his duty to do. No one is able to assign any reason why he did not perform his duty, and in point of fact there is not the slightest ground to impeach either his veracity or the accuracy of his statement on this point.

It is not denied by the respondents that the schooner, when she was first seen by those on board the ship, appeared to be going to the windward of their vessel, but their theory is that she afterwards changed her course, as if going to the leeward of the ship, and when she had approached within a short distance luffed across her bows. Such is the theory expressly set up in the answer, and in effect it is the theory attempted to be sustained by the proofs. Take, for example, the testimony of the pilot. He was asked how the schooner was going when he first saw her, and to that question he replied that she appeared to be going to the windward of the ship. That theory admits that the schooner when first discerned was sailing in the right direction, and clearly implies that her course was twice changed afterwards, before the collision took place. True it is that the pilot says, in another part of his testimony, that she did not come on to the regular course when she rounded the point, but that statement finds little support in the evidence, and is believed to be incorrect. According to his own account, the schooner was then a mile distant, and when directly asked how far she was from the ship when she fell off, he says perhaps it might have been a quarter of a mile, showing conclusively that he did not properly discriminate as to time and place in his former answer. Other witnesses examined by the respondents testify that they first saw the schooner one point on the lee bow of the ship, and that she came down the channel in a very irregular and varying course. Many of them also tes-

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tify that, just before she approached the ship, she luffed across her bows, as alleged in the answer.

To support that theory the respondents assume that the course of the schooner was twice changed in going down the channel; that she first fell off close to the leeward shore, and then almost at the instant of collision luffed across the bows of the ship; and a large number of witnesses are examined by them, who testify to that effect. None of their witnesses, however, were on board the schooner, and those last referred to are speaking of events which they suppose to have occurred at the very moment the two vessels came in contact, when it clearly appears that there was much confusion on board the ship.

Witnesses were also examined by the libellants, and among the number are the mate of the schooner who was at the wheel, and the master who commanded her deck. They testify, without qualification, that the schooner throughout the passage down the Narrows was kept close to the wind, and affirm in the most positive terms that she was not suffered to fall off, and did not luff at all. Both the master and the mate knew what their own acts were, and unless their statements are correct they must have wilfully perverted the truth. Those examined by the respondents may be in error, and yet may not have stated what they do not believe to be true. Twilight was already waning before the vessels came in contact, and the witnesses for the respondents may have inferred that the schooner luffed, from the fact that her helmsman actually crowded her into the wind at the moment of the collision with a view to escape, if possible, the consequence of the sudden and unexpected change made by the ship.

All experience shows, where there is, as in this case, a great disparity in the size, power, and speed of vessels approaching from opposite directions, that those in charge of the smaller of the two are very apt, as the danger of collision becomes imminent, to attempt through fright or otherwise to make some change in the course of the vessel, hoping, oftentimes vainly, either to shift the blow to some less dangerous part of the vessel, or to escape its consequences altogether. Prompted, as such efforts usually are, by good motives and the instincts of self-

preservation, they are not in general regarded as faults, and certainly not when it appears that the act was superinduced by the primary fault of the other vessel. *New York and Liverpool Mail Steamship Co. v. Rumball*, 21 How. 383.

Ten of the witnesses examined by the respondents, including a passenger, belonged to the ship, three were on board a steam-tug which had just gone up past both vessels, and four were on other vessels not very distant from the place of collision. Most of them represent more or less positively that the ship, just before and at the time of the disaster, was sailing within from thirty to fifty feet of the lee shore, or at all events about as near as she could sail with safety. They all agree, however, that vessels of the largest size can sail very close to that shore, and nothing can be more satisfactorily proved than is the fact that the force of the collision was such that the two vessels became so entangled together that it required some ten or fifteen minutes to separate them, and that during a considerable portion of that time both vessels were drifting to the leeward.

The reason why they so drifted is apparent from the undisputed facts of the case. Immediately after the collision, the crew of the ship hove back the main yard and mizzen top-sail; and in point of fact commenced, without delay, to take in or shorten all the sails. After the collision, the steam-tug, at the hail of the mate of the ship, returned for the purpose of towing the ship clear of the wreck. With that view she at first fastened a hawser to the schooner, and endeavored to pull her masts clear; but finding that the object could not be effected in that way, she got a hawser out astern of the ship, and towed the ship stern foremost clear of the schooner. During a considerable portion of this time the two vessels were drifting to the leeward, and it may be that the witnesses of the respondents mistook the place of collision for the place where the two vessels were when the ship was relieved, overlooking the fact that they had previously drifted towards the leeward shore. Assistance had been offered to the ship by the steam-tug before she entered the Narrows, but the offer had been refused by the ship, because she had a good leading breeze. Prior to the collision, the steamer had

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gone up past the ship on the windward side of the channel, and had also gone past the schooner on the leeward side.

Three of the crew of the ship were also examined by the libellants. Of these, one was the helmsman, and his testimony is of great importance in the case. He went to the wheel at six o'clock, and was in charge of it when the collision occurred. Just before it took place, the pilot, the master, a passenger, who was also a master mariner, and the mate, were all standing on the quarter-deck conversing. Presently the pilot stepped under the lee of the spanker, on the starboard side of the ship, and saw a vessel ahead under the lee of the ship. Instantly he called to the mate, and directed him to go forward and see how the vessel was standing. Pursuant to the order, the mate went forward, and perceiving that she was heading to the windward of the ship, he responded to the order, "All right, she's going to windward," but in a short time was heard to say, "Luff, hard down, hard down, luff," which were the first words heard by the man at the wheel. As soon as the wheelsman heard those words, the pilot, as he says, repeated the words, "Hard down, luff"; and the witness testifies positively that he put the wheel down or nearly so. Before he could get it quite down, however, the pilot directed him to put it hard up, and jumped from the house and helped him execute the order, but the ship came in collision with the schooner before the change of the wheel from hard down to hard up had any effect upon the course of the ship. She was a large vessel of some fifteen hundred tons burden, and was sailing about eight miles an hour, while the schooner measured only about one hundred and twenty-nine tons, and was not sailing more than three or four knots an hour. When the wheelsman was asked how far he put the wheel down, under the first order, and whether it had the effect to change the course of the ship, he answered that he put it nearly down, and that it changed the course a point and a half, as near as he could judge by the light in the range ahead.

Since the commencement of the suit the pilot has had an interview with the witness, and endeavored to convince him that the ship did not luff when he put the wheel down. His response to the suggestions of the pilot is one of some significance in this

connection. He told the pilot the ship must have luffed, and he knew she did by the mark he had on the land.

Another of the seamen belonging to the ship, and one of those examined by the libellants, strongly confirms the statements of this witness in several essential particulars. When the mate was sent forward, the witness was in the forecastle of the ship, and heard what the mate said. According to his account, the mate very soon sung out to the schooner to luff, and the master replied that he could not; but the mate hallooed a second time, saying, "You must luff; heave her hard down." While this colloquy was going on between the mate of the ship and the master of the schooner, the witness says the ship luffed, and he accounts for it on the ground that the pilot made a mistake; that he understood the mate as speaking to those in charge of the ship, instead of those in charge of the schooner.

Without an exception, every one of those in charge of the schooner testify in the most positive terms that her course was not changed from the moment it was taken for the purpose of passing through the Narrows till the collision occurred; and the answer of the master to the hail of the mate of the ship goes very far to show that she was close on the wind at that time. Directions were given by him to the wheelsman, before he went forward, to hold her up close, and when he was hailed by the mate of the ship to luff, his answer was that he could not, and doubtless for the reason that she was already as close to the wind as she would lay. Numerous witnesses examined by the respondents affirm that the ship did not luff, but not one of them denies that this mistake was made by the wheelsman. Remarks made at the time, both by the master and the pilot, indicate very strongly that they were then of the opinion that the collision was justly ascribable to the indiscretion of the mate, and to the blunder which he occasioned. By the former it was said that the mate "bothered" the pilot, and by the latter that it would have been better if the mate had stayed aft where he was.

Without entering more into detail, I am of the opinion, upon the whole evidence, that the schooner did not change her course, as alleged in the answer, but that the collision was occasioned by the mistake on board the ship.

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Since the appeal, the respondents have filed an amendment to their answer, which they ask to have allowed. They propose to add, in effect, that the ship at the time of the collision was under the entire control and management of a legally authorized pilot, who by law had a right to the charge of the ship, and who alone is responsible for any damages arising from any fault in her navigation.

Suppose the amendment to be allowed, and to be a part of the answer, and the proposition to be assumed as stated in the proposed amendment, two replies may be given to the proposition, either of which is decisive against it.

No proper view of the evidence will justify the conclusion that the mistake which caused the collision was solely attributable to the pilot. On the contrary, even if it be admitted that the pilot repeated the words which led to the error, still it was not an order deliberately and understandingly given, but was clearly superinduced by the rashness and indiscretion of the mate. Whatever error, therefore, was committed, was not in fact caused by any negligence or unskillfulness on the part of the pilot, but by the officious and unauthorized interference of the first officer of the ship. It was so understood by the master, when he reprimanded the mate for having "bothered" the pilot, and by the pilot, who at the moment remarked that it would have been better if the mate had stayed aft, where he was before he was sent forward to see how the schooner was standing. But the pilot denies that he repeated the order, and the wheelsman is not supported in that particular by any other witness who had any knowledge upon the subject. That the mistake was caused by the mate there can be no doubt, but it was actually made by the wheelsman. When he heard the hail of the mate, he mistook it for an order directed to himself, and put the wheel down, so that it not only does not appear that the fault was attributable solely to the pilot, but the evidence clearly shows that the collision was occasioned through the fault of those belonging to the ship.

Owners are declared by statute in England not to be liable for any loss or damage by reason of any neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel.

Under that statute it was formerly held, that if there was neglect in the navigation of the vessel, and there was a pilot on board, the neglect was, *prima facie*, attributable to the pilot. But the rule is now well established that the burden is on the owners to show, in order to bring their case within the provisions of the statute, that the pilot was alone in fault. *The Protector*, 1 Wm. Rob. 45; *The Diana*, 1 Wm. Rob. 131; *The Ripon*, 6 N. C. 245; *The Christiana*, 7 N. C. 2; *Steuart v. Isemonger*, 4 Moore, P. C. 11; *Hammond v. Rogers*, 7 Moore, P. C. 160; *The Batavier*, 40 Eng. L. & Eq. 19; *The Mobile*, 20 Law Rep. 172.

Vessels are not positively bound in any case, by the law of this State, to employ a pilot, whether going in or coming out of a harbor; but when inward bound, and a pilot seasonably offers his services and is ready to enter upon the duty, the ship must pay pilotage fees, even if his services are refused. While on board, the pilot, in the absence of the master, has the exclusive control and direction of the navigation of the vessel; but if the master is present, the power of the pilot does not so far supersede the authority of the master, that the latter may not, in case of obvious and certain disability, or gross ignorance and palpable and imminently dangerous mistake, disobey his orders and interfere for the protection of the ship and the lives of those on board. Divided authority in a ship with reference to the same subject-matter is certainly not to be encouraged, and can never be justified or tolerated, except in cases of urgent and extreme necessity. While standing by and witnessing a self-evident mistake manifestly and imminently endangering the ship, and certain to cause a collision, the master should not remain silent, but might well interpose, so far at least as to point out the error, and suggest the proper corrective. Had there been less conversation on the house or quarter-deck of the ship, among the master mariners there assembled, just before the schooner was discerned, and more attention given to the duties of a lookout, it is believed there would have been much less occasion for haste in sending the mate forward, and greatly less confusion on board the vessel at the moment of danger. Ship-owners, it is true, are held not liable by statute in some jurisdictions, when the ship is under the

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charge of a pilot ; but the circumstances of this case are such, that the application of the rule in this controversy, even if it can be acknowledged at all under our jurisprudence, would be most unjust and inequitable.

Prior to the statute in England, Sir William Scott held, in the case of *The Neptune*, 1 Dod. 467, that parties who suffer by a collision are entitled to have their remedy against the vessel occasioning the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. It cannot be maintained, said that learned judge, that the circumstance of having a pilot on board, and acting in conformity to his direction, can operate as a discharge of the responsibility of the owner ; and such is believed to be the true exposition of the maritime law, independently of any statutory regulation upon the subject. Ships sailing to and from certain ports in England are obliged by law to receive a pilot, and it is upon the ground that the relation of principal and agent does not exist in such cases between the owners and the pilot, that her courts have held that his presence and control discharges the owners from all responsibility, in case the accident happens entirely through his fault. But it is not correct to suppose that the master, in this State, even of an inward-bound ship, is compelled to accept the services of a pilot. Notwithstanding a pilot may seasonably offer his services, still the master may decline them and continue to navigate his vessel ; but in that event he must pay the legal fees of the pilot. *Martin v. Hilton*, 9 Met. 371 ; *Hunt v. Carlisle*, 1 Gray, 237.

Remarks of the court are to be found in the case of *The Carolus*, 2 Cur. 71, which seem to indicate that the owners of an inward-bound vessel, having a pilot on board, are not liable in a case like the present ; but those remarks were not necessary to the decision of the cause, and the weight of authority in this country is greatly the other way. *Smith v. Creole*, 2 Wall. Jr. 485 ; *Bussy v. Donaldson*, 4 Dall. 206 ; *Williamson v. Price*, 4 Mar. (N. S.) 399 ; *The Bark Lotty*, Olcott's Adm. R. 329 ; *Yates v. Brown*, 8 Pick. 23.

Chancellor Kent says the pilot is considered as master *pro hac*

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vice ; and if any loss or injury be sustained in the navigation of the vessel while under his charge, he is answerable as strictly as if he were a common carrier for his default, negligence, or unskilfulness ; and the owner also is responsible to the party injured by the act of the pilot, as being the act of his agent. 3 Kent's Com. (9th ed.) 243. See also *Haggett v. Montgomery*, 5 Bos. & Pull. 466 ; *Attorney-General v. Case*, 3 Price, 302 ; Abb. on Ship. (5th Am. ed.) p. 220.

Upon the whole case, I am of the opinion that the decision of the District Court was correct, and the decree there made is accordingly affirmed, with costs.

ANTONIO YZNAGA et al. v. CHARLES H. PEASLEE.

Where sugar imported into the United States is appraised by samples which were drawn from the packages by the person called the sampler, and were delivered by him to the local appraisers, and the examination was made by them without having seen the packages, *held*, in the absence of any objection by the importers as to the manner of drawing the samples, or to their identification, that it was a substantial compliance with the requirements of the act of Congress authorizing the appraisal in such a case to be made by samples.

And where, upon appeal to merchant appraisers, the samples were, after the decision of the local appraisers, placed in the depository in the appraisers' department, and were there kept until the meeting of the merchant appraisers, and were then produced by one of the local appraisers, and no objection as to the identity of the samples being then made by the importers, *held*, that all objections which might have been taken at the appeal were waived by the importers.

If the samples are fairly selected from one in ten of the packages, and are fully identified, it is of no importance whether they were drawn from the packages by the appraisers themselves or by the official sampler of the appraisers' department.

THIS was an action of assumpsit brought by the plaintiffs as importers of foreign merchandise, against the defendant as collector of the port of Boston, to recover back an alleged excess of duties which they had previously paid on an importation from Trinidad, of two hundred hogsheads of Muscovado sugars. The goods were entered at the custom-house at Boston for warehousing at the public stores, October 28, 1853. Certain additions

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were made to the invoice value by the importers at the time of the entry, so that the entry value amounted to seven thousand seven hundred and fourteen dollars. To this amount the local appraisers added six hundred and ninety-six dollars and twenty-three cents. The importers appealed to merchant appraisers, but they returned the same sum, making the dutiable value of the importation eight thousand four hundred and ten dollars and twenty-three cents. Duties were accordingly calculated on that basis, and the appraised value exceeding by ten per cent the value declared in the entry, a duty of twenty per cent in addition to the duties otherwise imposed by law was levied and claimed by the collector. The local appraisers reported December 23, 1853; and the merchant appraisers, January, 1854. On the 2d and 3d of February the goods were withdrawn from the warehouse and the duties paid under protest. None of the hogsheads containing the sugars were actually examined by the local appraisers, nor were the sugars at any time seen by the merchant appraisers. The appraisement was made by both upon samples drawn out by the examiner of sugars, liquors, and cigars in the appraisers' department. His duties, as he stated, were to sample goods, and carry the samples to the office of the local appraisers. He is called the sampler, holding no commission, but usually selected by the local appraisers, and approved by the Secretary of the Treasury. Samples are drawn from one in ten of the packages; but where all the packages bear the same mark, indicating them to be all of the same description, one sample, containing a small quantity of the importation, from one in ten of the packages, is usually regarded as sufficient to enable the appraisers to perform their duties according to law. Such samples, when properly prepared, are put into secure wrappers, marked with the number of the manifest, together with the marks of the packages from which they were selected, and other marks to secure their identification. When thus prepared, the samples are placed in a depository designated for the purpose, and there kept until examined by the local appraisers. In case appeal to merchant appraisers is taken, the samples are kept in the same depository until examined by them. Objection in this

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case was made that the samples were not properly drawn, and also that they were not satisfactorily identified with the sugars in question. The jury gave a verdict for the defendant, subject to questions of law that arose at the trial.

B. F. Hallett, for plaintiffs.

The merchant appraisers cannot delegate any part of their powers and duty of examining one in ten of the packages, or samples of one in ten, to any other person. The importer, on his appeal, is entitled to the judgment of the merchant appraisers, based upon their knowledge of the true value of the merchandise. *Bartlett v. Kane*, 16 How. 263–272; *Rankin et al. v. Hoyt*, 4 How. 335; *Tappan v. United States*, 2 Mas. 406. That the merchant appraisers should give their decision upon the mere exhibition of supposed samples, without it being conclusively known to them that they are genuine and fair samples, is imposing a risk upon the importer, against which the law expressly protects him. 5 Stat. at Large, 563, §§ 16, 17, 21; *Greely's Admr. v. Burgess et al.*, 18 How. 415, 416; 4 Stat. at Large, 410; 3 Stat. at Large, 375, § 16. If the merchandise be such as is bought and sold by sample, the appraisement may be made by samples, due care being taken that they are fairly selected from the packages, designated on the invoice by the collector, and identified as such. Treas. Reg. 1857, 321. The “due care” applies to the appraisers, who must have the knowledge personally. *Greely v. Thompson et al.*, 10 How. 225. The act of the appraisers was in the nature of a judicial act.

C. L. Woodbury, for defendant.

As to the duty of appraisers. 3 Stat. at Large, 735; 5 Stat. at Large, 563. Sampler. 4 Stat. at Large, 411. And the clerks and all other persons employed in the appraisers' office shall be appointed by the principal appraisers, and the number and compensation fixed by the Secretary of the Treasury. Treas. Reg. 1857, 277. What examination of goods necessary. *Sampson et al. v. Peaslee*, 20 How. 580; *Burgess v. Converse*, 2 Cur. 216. The sampler, as clerk, has a substantial duty to perform, and as an officer of the United States his duties are described in his oath. The drawing of samples is a ministe-

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rial act, not requiring judicial discretion. *Barry v. Arnard*, 2 P. & D. 646. It is a general principle that a ministerial officer cannot appoint a deputy. Broom's Leg. Max. 666; *Cooper v. Coates*, 5 Man. & G. 98; *Midhurst v. Waite*, 3 Burr. 1260. Where no discretion or judgment are required. *Rex v. Lenthall*, 3 Mod. 150. Ministerial act with discretion involved. *Parker v. Kett*, 1 Salk. 96. There is no imperative statute rendering a personal inspection necessary. Dwar. on Stat. 606-611; *Cooper v. Coates*, 5 Man. & G. 98; *Midhurst v. Waite*, 3 Burr. 1260.

CLIFFORD, J. Mere matters of fact, it must be understood, were settled by the verdict, and the finding of the jury will not be revised by the court in a proceeding like the present.

Evidence was introduced by the defendant, showing that the goods constituting the importation were of the class bought and sold by samples, but there was considerable contrariety in the testimony as to the manner in which the samples were usually drawn in such sales. Both parties examined the sampler as to the manner in which the samples in this case were drawn, and he admitted that his recollection of the particular transaction was not very distinct. Taken as a whole, however, his testimony shows, to the satisfaction of the court, that he went to the vessel, or to the place where the vessel was discharged, and drew the samples in the usual and regular way, according to the course of business at the custom-house and the practice of the port. Two samples, at least, were exhibited to the appraisers on the appeal, and, from the marks found upon the wrappers recognized by the sampler, there can be no doubt that they were the identical samples drawn from the sugars in question, and used by the local appraisers. Notice was given by the attorney of the plaintiffs of the time and place designated for the hearing of the appeal, and he testifies that he was present with the merchant appraisers. When the samples were exhibited, he inquired what evidence there was of their identity, or that they had been properly taken, and he states in substance and effect that he received no answer to his inquiries; but he made no objection to an examination by samples, and by his silence acquiesced in the proceedings, re-

maining at the public store until he ascertained that the goods had been advanced. Certain propositions of fact involving the identity of the samples and the fairness of their selection are also submitted by the plaintiffs, which, in the view taken of the case, need not be further noticed, as they are sufficiently answered by what has already been remarked. Suffice it to say, without entering more into detail, that all those propositions are substantially negatived by the jury, and in the view of the court were fully disproved by the evidence. With these remarks we come to the examination of the legal questions presented in the case, which are involved in greater difficulty, and will require more careful consideration. Appraisement by samples is conceded to be lawful where the goods imported are such as by commercial usage are bought and sold in that manner in the market, provided due care be taken that the samples are properly and fairly selected from one in ten of the packages as designated on the invoice, and provided the samples when exhibited to the appraisers and examined by them be fully identified as the ones selected for the purpose. But the plaintiffs deny that the appraisers can lawfully delegate their power and duty to another person to select the samples from packages designated on the invoice by the collector, or, in other words, they insist that to allow the samples to be selected by a sampler, as in this case, is imposing upon the importer a risk and uncertainty wholly unauthorized by law. Collectors are required to designate on the invoice at least one package of every invoice, and one package at least of every ten packages of imported goods, wares, and merchandise, and order the same to the public store to be opened, examined, and appraised. 5 Stat. at Large, 565; Treas. Reg. p. 182. Bulky articles, however, are seldom or never sent to the public store; and in respect to such importations the regulations provide that the collector "will direct their examination on the wharf, or other safe and suitable place, to be designated by him for that purpose." Recurring to those regulations, it will be seen that they also provide that, "if the merchandise be such as by commercial usage are bought and sold by samples, or where by such usage the character and

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quality of the merchandise are so determined, the appraisement may in such case be made by samples, due care being taken that they are properly and fairly selected from the packages designated on the invoice, and identified as such samples. Usage has sanctioned this mode of appraisement as constituting a compliance with the requirements of law, and it is now too late to question its correctness in the cases provided for in the treasury regulations. Those regulations were framed to enable the officers of the customs to perform their duties in the collection of the revenue; and it is difficult to see, where the importation consists of such goods as liquors, sugars, and the like, in what other satisfactory mode the appraisement could be effected. Such considerations undoubtedly induced the department to adopt the regulations, and inasmuch as it comports with a reasonable construction of the act of Congress, it may well be sustained. Samplers, it seems, are appointed under the sixth section of the act of the 28th of May, 1830, which, among other things, provides that the clerks and all other persons employed in the appraisers' office shall be appointed by the principal appraiser, and their number and compensation limited and fixed by the Secretary of the Treasury. 4 Stat. at Large, 411; and by the ninth section of the act of the 30th of July, 1846, all clerks employed by the appraiser are required to take and subscribe an oath or affirmation faithfully and diligently to perform their duties, and to use their best endeavors to prevent and detect frauds upon the revenue. 9 Stat. at Large, 44. Inspectors in charge of the sample office are required by the regulations of the treasury to make daily report to the store-keeper, stating what goods have been received and delivered in samples, and what have been transferred to the appraisers' store as merchandise for appraisement; and the regulations also provide that all labor in the receipt and delivery of samples shall be under the charge of the store-keeper at the appraisers' store; and for the faithful and prompt examination of sample packages, the appraisers are required to designate some competent officer connected with their department, to visit the sample office daily to superintend and aid in the examination of the packages. Pursu-

ant to these various regulations, the samples in this case were drawn by the person designated as the sampler in the appraisers' office, and were by him duly marked and delivered to the local appraisers. Examination of the samples was made by them on the 23d of December, 1853; and they having marked up the goods, and the importer having appealed, the samples were placed in the depository in the appraisers' department, and there kept until the meeting of the merchant appraisers, when the samples were again produced by one of the local appraisers.

No objection is made to the proceedings before the local appraisers, and indeed none could be successfully urged, if the action of the merchant appraisers on appeal was correct. *Burgess et al. v. Converse*, 2 Cur. 214. Some of the remarks of the judge in that case would seem to indicate that samples not drawn by the appraisers themselves could not in any case be allowed, but the conclusion of the opinion entirely negatives that view of the law, because the judge submitted the question to the jury, whether the examination actually made was in substance and effect equivalent to an examination of at least one package in ten of the goods constituting the importation. Examination had been made in that case by samples not selected by the appraisers, and the jury, under that instruction from the court, returned their verdict for the plaintiff, affirming that the examination made was not in substance and effect equivalent to the described examination of the packages. Error was brought by the defendant, but the Supreme Court approved the charge of the Circuit judge. *Greeley's Adm. v. Burgess*, 18 How. 416. Those cases, however, do not decide that a lawful examination and appraisement may not be made by samples where the samples are properly and fairly selected and fully identified, according to the regulations of the Treasury Department. On the contrary, the opinions in both cases impliedly admit that the appraisement, under some circumstances, may be made in that way, especially if it appear that the examination made was in substance and effect equivalent to an actual examination of the packages. Exceptions were taken to the examination of the packages in *Sampson et al. v. Peaslee*, 20 How. 571, upon the ground that it

was incomplete and insufficient; but the court held that where the examination is such as is usually made in buying and selling the articles, and was satisfactory to the appraisers, it was not open to the importer to show that it was insufficient. Nothing is wanting in this case to give full efficacy to the action of the appraisers, if in any case the examination may be made by samples, except that the samples were selected by the sampler in the appraisers' department, and not by the appraisers themselves, as explained in the statement of the case. But due notice of the time and place appointed for the hearing of the appeal was given to the attorney of the plaintiffs, and the evidence shows that he was present at the examination for the purpose of protecting their interests. Inquiry was made by him what evidence there was of the identity of the samples, or that they had been properly selected, but he did not object upon the ground that the samples had been selected by the official sampler of the appraisers' department, and not by the appraisers; and, under the circumstances, he must be understood as having waived all objections respecting the samples, except such as are impliedly involved in his inquiries. Those inquiries had respect to the identity of the parcels exhibited and to the manner of the selection, and not to the person or persons by whom it was made. Both of those objections, even assuming that they were not subsequently waived, are fully overcome by the evidence. Considering the marks upon the wrappers, all question about the identity of the parcels is wholly removed, and the testimony of the sampler is entirely satisfactory to the point that the samples were selected in the regular and usual way. Giving all due latitude of construction to the inquiries made by the attorney, it is not possible to infer from his conduct that he intended to make any other objections to the samples than those already considered; and if not, then the conclusion under the circumstances must be, that all others within his knowledge were waived. Present as he was with the appraisers, he knew the samples were not taken by them; and, what is more, he was present when the local appraiser produced the samples from the depository in the appraisers' department; and being well acquainted with the course of business in the office, he must have known by whom they were

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selected, as the evidence shows there was but one sampler in the department. Strong doubts are entertained whether there is any validity in the objection, even if it were open to the plaintiffs, but it is not necessary to decide it in order to dispose of the case. No one suggests that casks of sugars or liquors should be broken by the appraisers ; and if not, then, practically speaking, it is clear that the appraisement must be by samples, to be selected for the purpose. Assuming that samples are to be used, it cannot be very material to the importer whether they are actually drawn from the casks by the appraisers themselves or the official sampler of the appraisers' department, provided they are properly and fairly selected and fully identified. Samplers are appointed on account of their peculiar qualifications for the duties incident to the employment, and it is not perceived that they are any more likely to make mistakes than appraisers. In view of the whole case, I am of the opinion that there was no error at the trial, and, according to the agreement of the parties, there must be judgment on the verdict.

WARREN DELANO v. NATHAN WINSOR, JR., *et al.*

If the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive, unless disproved by something more than the testimony of one witness.

Where the complainant sought to recover damages of the respondents, because they improperly and unfaithfully executed the trust he confided to them, and the facts charged in the bill were clearly and positively denied in the answer, *held*, that inasmuch as the complainant failed to prove the facts charged by more than one witness, he had not overcome the denials of the answer.

The respondents were employed by complainant to obtain a cargo for his vessel, and complainant alleged that respondents were employed to ship the entire cargo at specified rates, payable in money, which was denied in the answer; and after the vessel was loaded, and had departed on her voyage, the respondents sent to complainant a statement or freight list prepared as if the whole cargo had been shipped at specified rates of freight, upon which complainant thereupon paid the agreed commissions. *Held*, that as a portion of the cargo was in reality shipped at half profits, the making of the freight list amounted to a misrepresentation.

THIS was a bill in equity wherein the complainant, owner of the ship *Mastiff*, sought to recover damages of the respondents,

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as his agents, because they improperly and unfaithfully executed the trust he confided to them, as ship-brokers, to procure a cargo of freight for the vessel, and also on account of certain misrepresentations made by them in respect to the same, whereby he was induced to pay them in commissions a greater sum than they were entitled to receive. The complainant made application to the respondents to procure a cargo for his vessel while she was lying in the harbor of Boston bound for San Francisco, and agreed to pay them five per cent on the amount of freight and primage of the goods laden on board. After the merchandise was shipped, the respondents sent to the complainant a freight list of the same, and a statement of the money to be earned in their carriage and delivery, showing freight including primage to the amount of \$2,001.20, upon which the complainant paid them \$1,005, besides other charges. The complainant alleged that the respondents were employed to procure the cargo at specified rates of freight, payable in money, and not on terms of half profits, and relying upon the freight list he believed the goods were to be carried for the specified rates of freight; but such was not the case, as appeared by the bill of lading signed by the respondents. According to the bill of lading a large portion of the cargo, to wit, fifty-seven tons of pig-iron, three hundred and thirty-three "nests" of tubs, so called, and seventy-five dozen pails, were shipped at "one half net profits over costs and charges," and these could not be sold at any profit, and he consequently received no compensation for them. He therefore insisted that the respondents were bound to pay him the loss he had suffered by their acts. The answer denied that the respondents were employed to procure a cargo of any particular kind or at specified rates of freight in money, and alleged that the kind of cargo and rates and terms were by the agreement left to their judgment and discretion. They also denied that they intended to represent in the statement that all of the cargo was procured and shipped at specified rates, to be paid in money, or that the statement contained any such representation.

F. C. Loring, for plaintiff.

Equity has jurisdiction, because plaintiff seeks to correct an

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account rendered by defendants. 1 Story's Eq. Jur. 429. Transactions between principal and agent being coupled with a *trust*, relief may be had in equity as well as at law. Hoven-den on Frauds, 161, 162. Plaintiff has no remedy at law, neither in debt, covenant, assumpsit, trover, nor case. His claim is, that defendants shall make their representation good. Equity only can give this relief. In *Harding v. Carter*, 1 Marsh. Ins. 210, it was held that trover would lie for a policy of insurance never made. It has been doubted whether the relief should not have been sought in equity. *Tickel v. Short*, 2 Ves. Sen. 239, is in point. *Gray v. Murray*, 3 Johns. 167, same principle. Ground of action is false representation of the defendants, by reason of which they charged and received a larger commission than they otherwise would, and so are bound to make it good. *Gray v. Murray*, 3 Johns. 185.

Ranney and *Morse*, for defendants.

If the plaintiff has any cause of action, he has a plain, adequate, and complete remedy at law, and a court of chancery has no jurisdiction of it. 1 Stat. at Large, 82; *Baker v. Biddle*, 1 Bald. 405; *Sadler v. Robinson*, 2 Stew. 520. It is not a case of fraud alleged or proved, nor one of trust or the violation of any trust. *Russ v. Wilson*, 22 Me. 207; *Porter v. Spencer*, 2 Johns. 170. If it is merely a case of violated contract in the shape of a warranty that the goods in question were shipped on a specific fixed rate of freight, an action at law is the clear and proper remedy. The omission to state the amount of freight on the iron, tubs, and pails as "estimated," so as to get a reasonable compensation in the shape of commissions as was customary and reasonable, was by mistake and accidental. At the worst, it was but a misrepresentation, which harmed nobody, and never would have been noticed if the goods had netted a rate of freight satisfactory in half profits. To recover the actual damages resulting from such misrepresentation would be the extent of the liability, if any. *Cunningham v. Bell*, 5 Mas. 161, 172; *Bell v. Cunningham*, 3 Pet. 69, 85; *Green v. Goddard*, 9 Met. 223; *Brown et al. v. McGrau*, 14 Pet. 480, 496; *Blot v. Boiceau et al.*, 3 Comst. 78; *Gould v. Rich*, 7 Met. 539 - 546; *Frothingham v. Everton*, 12 N. H. 239.

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CLIFFORD, J. Two grounds of claim are set up by the complainant which must be separately and carefully considered. Claims so entirely distinct in their nature, although presented in the same bill of complaint, cannot be so blended together as to excuse the court from their separate examination.

Careful attention to the first claim, as stated in the bill of complaint, will show that it is for damages arising from the breach of a contract to procure a cargo of goods as freight for a certain vessel, on a given voyage, at specified rates of freight, payable in money on the transportation and delivery of the goods; and the breach alleged is, that the respondents did not perform the contract; that a portion of the cargo procured and shipped was not subject to specified rates of freight payable in money, but that the articles were procured and shipped upon terms of one half net profits over costs and charges. Allegation is not made in the bill of complainant that cargo in lieu of that shipped, subject to freight at specified rates, payable in money, and such as it is alleged the respondents undertook and agreed to procure, might have been obtained in the market, or that the failure to procure such was occasioned through the negligence or unskilfulness of the respondents; but the allegation is, — and that is the foundation of the claim, — that the respondents undertook and agreed to do what they did not and have not performed, and that the non-performance of the undertaking and agreement has occasioned loss to the complainant which the respondents are bound to make good in the manner therein described. Taking the case as stated in that part of the bill of complaint under consideration, it plainly has all the material elements of an action on the case, founded upon a special undertaking and agreement in the nature of a warranty, and the non-performance of the same, where special damages are claimed for the breach of the undertaking and agreement. Special damages are evidently claimed in this case, because the complainant alleges that the respondents are bound to make good the loss he has suffered by their doings, and pay to him the sums of money he would have received if they had performed their undertaking and agreement. Irrespective of the question of jurisdiction raised in the case, the

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first question to be considered is, whether the complainant has proved the special undertaking and agreement on which the suit in this behalf is founded. Unless the respondents undertook and agreed to procure and ship the cargo on the terms assumed by the complainant, there could be no such breach of contract as is alleged, and of course there can be no cause of action. Such, undoubtedly, were the views of both parties at the inception of the litigation, as is obvious from the manner in which the pleadings are drawn. Distinct allegations upon the subject are to be found both in the bill of complaint and in the answer of the respondents. Complainant alleges that the commission, agency, and trust for which he retained the respondents were to procure a cargo for the vessel, to be carried and delivered on payment of freight in money at specified rates, and not upon half profits, which leaves it clearly to be implied that the whole cargo was to be procured and shipped at specified rates. On the other hand, the respondents deny that they were retained for that purpose, or that the undertaking and agreement contemplated that all of the cargo should be procured and shipped to be carried and delivered for payment of freight in money at specified rates, and none of it upon terms of half profits; and to make the denial more explicit, they also allege that the kind of cargo to be procured, together with the rates and terms on which the goods were to be transported, were to be left to their judgment and discretion; so that the denial is as full and explicit as it well can be made. Where the facts charged in the bill as the grounds for obtaining the decree are clearly and positively denied in the answer, and are only supported by one witness, the rule is well settled that the court will not decree against the defendant. *Union Bank of Georgetown v. Geary*, 5 Pet. 111; *Atkinson v. Manks*, 1 Cow. 703; *Walton v. Hobbs*, 2 Atk. Ch. R. 19; *Pember v. Mathers*, 1 Bro. Ch. Cas. 52. Where the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive unless disproved by more than one witness. 1 Paige, Ch. R. 241; *Daniel v. Mitchell et al.*, 1 Story, 188. Two witnesses, or one witness with probable circumstances, says Marshall, Ch. J., in *Clark's Exrs. v. Van Riemsdyk*, 9 Cran. 160, will be required to

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outweigh an answer asserting a fact responsively to a bill. He also states very clearly the reason for the rule, which is, that when the complainant calls upon the respondent to answer an allegation, he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness; and as the complainant cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance. *Hughes v. Blake*, 6 Wheat. 453. Satisfactory proof, even by one witness, that the respondents undertook and agreed to procure and ship the whole cargo at specific rates, payable in money, is not to be found in the record. Great reliance is placed by the complainant on the testimony of the master, but it is sufficient to say on that subject for the present, that it is not very full to the point, or very definite as to the terms of the agreement. Another witness is called by the complainant, who had the charge of the work in finishing the ship, and was present all the time she was loading for the voyage in question, but he states expressly that he does not know anything about the terms on which the iron was taken on board, and that he had nothing to do with the rates of freight. All he can state is, that he gave no authority to ship goods at half profits, and had no knowledge that any were shipped on such terms. Opposed to this is the testimony of the clerk of the respondents, who states in very positive terms that the respondents were to take the ship, load her to the best of their ability, and do the best they could; that they had no specific instructions; that the loading of the ship was left to their judgment and discretion to load her as "all others are loaded." Testimony was introduced in respect to the circumstances under which the iron was procured and shipped, and the details of the evidence were much relied on by the respondents to support the statements of their witness; and they also introduced certain letters of the complainant, and offered those written by themselves of the same series; but it is unnecessary to enter into those details, as I am of the opinion that the complainant in this branch of the case has failed to overcome the denials of the answer filed by the respondents, especially as the allegations of

the answer are supported by the positive statements of a credible witness. Reference to the freight-list was made at the argument, as tending to show the alleged undertaking and agreement, but it is evident that it cannot have much weight in that direction, because the goods had been shipped and the vessel had departed on her voyage before it was forwarded or even prepared. Evidence is entirely wanting to show, from the state of the market, that the additional freight at paying prices could have been obtained for the port of destination at specified rates, or that the respondents were guilty of any negligence, unfaithfulness, or unskilfulness in executing their trust. Adventures to that distant market were attended with great uncertainty, and mercantile information upon the subject was so imperfect that the failure of an enterprise furnished but slight evidence to impeach the judgment and discretion of those who entered upon them. Estoppel cannot be set up, as the evidence fails to show that the respondents ever undertook or were employed to procure and ship the entire cargo or the goods in question at specific rates; and the act of preparing and sending the freight-list was after the vessel had departed, and after the fact of her departure was well known to the complainant. Attention to these considerations will show that the cases *Tickel v. Short*, 2 Ves. Sen. 239, and *Gray v. Murray*, 3 Johns. 167, do not apply, even if the principle there laid down could under any circumstances be regarded as applicable to a case of this description.

Sufficient has already been remarked to explain the grounds on which the second claim rests. Part of the cargo had been procured and shipped upon the terms of one half the net profits over costs and charges. Having completed the shipment, and the vessel having departed on her voyage, the respondents forwarded the bills of lading which had been signed by themselves, and prepared the freight-list and sent it to the complainant. They prepared it as if the whole cargo had been procured and shipped at specified rates of freight, making the total amount of freight, including the primeage of the goods, twenty thousand and one dollars and twenty cents. When they sent the freight-list, they also sent their account for commissions, claiming five per

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cent on the whole amount set down in the statement, and the complainant, trusting to the accuracy of the representation, paid the amount claimed. Misrepresentation and mistake are both charged in the bill of complaint as the foundation of this claim. Blended as the two charges are in the bill of complaint, it is somewhat difficult to separate them, and it is that difficulty which has occasioned the only doubt in the mind of the court on this branch of the case. After full consideration, I have come to the conclusion that the allegations of the bill of complaint are sufficient to support the claim, which is substantially based in the pleadings upon mistake induced by misrepresentation. Authorities are not necessary to show that errors in the settlement of accounts between principal and agent, especially if induced by misrepresentation, are cognizable in equity. 1 Story's Eq. Jur. §§ 462-464, 524-526; *Daniel v. Mitchell et al.*, 1 Story, 190. All of the allegations of the bill of complaint in this branch are admitted, except the allegation of misrepresentation. Respondents in their answer admit that the freight-list was prepared as alleged, and sent to the complainant. They admit that the commissions were demanded and paid; and I am of the opinion that the statement in the freight-list, under all the circumstances of the case, amounted to misrepresentation. Undoubtedly the complainant was deceived, and was thereby induced to make payment where he would have declined to do so, if he had known the true state of the case. Small as the error is, it is, nevertheless, the right of the complainant to have the amount corrected; and inasmuch as the mistake was induced by misrepresentation, this court, sitting as a court of equity, cannot refuse to take jurisdiction of the case. Unless the amount is agreed, the cause must be referred to a master to ascertain it, and, when that is ascertained, the complainant will be entitled to a decree.

JOSEPH BURKE, Libellant and Appellant, v. THE BRIG M. P. RICH.

Where a vessel, seized under a warrant from the District Court, continued in the custody of the marshal until the case was disposed of in the Circuit Court, the marshal had no right to effect insurance on the vessel, while so remaining in his custody, at the expense of either party, without their consent.

Money paid by the marshal for such insurance cannot be allowed in the taxable costs.

THIS case came before the court a second time on an appeal from the clerk's taxation of costs. As it appeared from the record, the vessel was seized under a warrant from the District Court, and remained in the marshal's custody until the cause was disposed of by a decree in this court. On the 13th of May, 1859, application was made to the District Court for an order that the vessel might be sold, which was not granted. The costs were taxed after the decree in this court. Among the items of the costs were two for insurance on the brig, paid by the marshal while she was in his custody. Objection was made to these items, and the question was, whether they should be allowed as taxable costs. It was insisted by the libellant that, inasmuch as the delay in the suit was occasioned by the respondents insisting upon an unjust defence, the expense of insuring against the risk incident to the delay ought to be borne by them. To this reply was made that the process issued by the court authorized and made it the duty of the marshal to seize and keep the vessel, and that the law has provided the only compensation to which he is entitled for his services; that he had no power to insure the vessel at the expense of the respondents; and that the court is not authorized to allow the amount paid by him as taxable costs against the respondents.

H. A. Scudder, proctor for libellants.

Charles T. Russell, proctor for claimants.

CLIFFORD, J. It is obvious, from the statement already given, that the equities of the case are strongly with the libellant; but I am of the opinion, as matter of law, that the marshal had no authority to effect insurance on the vessel at the expense of either party without their consent. It is the duty of the marshal to

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execute throughout the district all lawful precepts directed to him and issued under the authority of the United States, and he has the same powers in executing such precepts as sheriffs or their deputies have in the performance of similar duties under the laws of the States. 1 Stat. at Large, 87. Whenever a seizure of property is made by him under a lawful precept, he is bound to use due and reasonable diligence to keep it in such safe and secure manner as to protect it from injury while in his custody, so that if it be condemned, or ordered to be restored to the owner, its value to the parties may not be impaired. Like the sheriff, he is only a bailee for a special purpose; and even if it be admitted that he may insure the property for his own protection, it is clear, I think, that the insurers would be liable only to the extent of his special interest, unless it appeared that in effecting the insurance he was acting under some authority from the owner. No case has been cited where it has been held that the sheriff is the agent of either party for the purpose of effecting insurance upon property attached and in his custody, and it is believed that no such case can be found. Want of authority is the foundation difficulty in the way of the libellant, and it is one which courts of justice cannot remove. Property seized under process from the admiralty is within the control of the court, and in general, where there is danger of irreparable loss during the pendency of the suit, it is ordered to be sold and the proceeds placed in the registry of the court. That power is liberally exercised by the court, so that in most cases where there is any real embarrassment, the marshal is relieved from extraordinary responsibility. Notwithstanding the seizure, the owner may insure if he sees fit, and, if he elects not to do so, the marshal is only responsible for such reasonable care and diligence as is imposed on him by law. He must perform his duty according to law, and is entitled to such compensation, and only such compensation, as the law prescribes and allows. 10 Stat. at Large, 164. Great abuse might result from the opposite rule; and in the absence of any decided case acknowledging the right claimed, and of any known practice of the courts sanctioning it, I am constrained to disallow the two items to which the objection applies.

OSCAR C. HALE v. JAMES W. BALDWIN.

A discharge of a debtor under a State insolvent law is invalid against a creditor or citizen of another State who has never voluntarily subjected himself to the laws of the State where the discharge was obtained, otherwise than by the origin of his contract, and the plea of such discharge is insufficient to bar the rights of the plaintiff.

THIS was an action of assumpsit. Defendant was the maker of a certain promissory note as follows :

\$2,000.

Boston, February 21, 1854.

Six months after date I promise to pay to the order of myself two thousand dollars, payable at Boston, value received.

JAMES W. BALDWIN.

The note was duly indorsed by the defendant to the order of the plaintiff. The plaintiff was and always had been a citizen of Vermont, and the defendant, at the time of the making the note, was a citizen of Massachusetts. After the making of the note and before the commencement of the suit, the defendant, upon due proceedings in the courts of Massachusetts, pursuant to the insolvent laws of the State, obtained a certificate of discharge from his debts, and then afterwards appeared and pleaded this discharge in bar of this action. The plaintiff did not prove his debt against the defendant's estate in insolvency, or otherwise become a party to the proceedings.

H. C. Hutchins, for plaintiff.

The decisions are uniform that if these notes had no particular place of payment, the discharge would be no bar. *Ogden v. Saunders*, 12 Wheat. 213 ; *Savoye et als. v. Marsh et als.*, 10 Met. 594. It makes no difference that the note was payable in Boston. This is a question, not where the contract was made to be performed, but whether the contract was made with a citizen of another State. *Whitney et al. v. Whiting et al.*, 35 N. H. 457 ; *Springer v. Foster et al.*, 2 Story, 387 ; *Demeritt v. Exchange Bank*, 20 Law Rep. 606 ; *Donnelly v. Corbett*, 3 Seld. 500 ; *Woodhull et al. v. Wagner*, Bald. 300 ; *Poe v. Duck*, 5 Md.

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1; *Fray v. Risk*, 4 Gill & Johns. 509; *Scribner et al. v. Fisher*, — dissenting opinion of Metcalf, J., — 2 Gray, 43–48; *Gardiner v. Lee*, 11 Barb. 558; *Hempstead v. Read*, 6 Conn. 480; *Smith v. Parsons*, 1 Ohio, 236.

F. A. Brooks, for defendant.

It is clear, upon legal authorities (excepting for the moment those cases where the State legislation is said to be limited, in this respect, by the United States Constitution), that a contract discharged by the *lex loci* (both of making and performing the contract), is discharged everywhere, and that the citizenship of the contracting parties is immaterial. Story's Confl. Laws, (3d ed.) §§ 242, 263, 279, 280, 335; *May et al. v. Breed et al.*, 7 Cush. 38; 2 Kent's Com. (6th ed.) 459.

The doctrine or principle seems to be, that, as contracts depend upon, and must be referred to, some legal sanction for construction, character, enforcement, or discharge, they shall be deemed to be referred to the laws prevailing where they are made and to be performed, and to which the parties have themselves referred them, by assigning locality to them.

Taking the above to be the well-settled doctrine, public or international law, the question is, whether, under the facts of this case, this doctrine is set aside, and the Massachusetts discharge shut out, because it comes under the constitutional prohibition against laws of the States impairing the obligations of contracts.

Now, inasmuch as the Massachusetts insolvent laws were in force at the inception of this contract, it follows necessarily that, if contracts are by public law, referred, for their character and incidents, to the existing legislation of the country where made or to be performed, these notes were, at their date, just as defeasible by the happening of the maker's insolvency and his discharge as if such a provision had been expressly incorporated on their face; and so only the condition and circumstances of the maker have changed, but not the legal nature of the obligation which he assumed in making the notes. The obligation was in its inception defeasible in a certain event, and it had not been impaired, except by its originally inherent qualities.

The proposition that this discharge contravenes the prohibition

against impairing the obligation of contracts rests entirely upon the fact of the promisees not being citizens of the same State in which the contract was made and to be performed, and therefore not being affected by the conditions attached by Massachusetts laws to the contract itself, and upon the supposed authority of the leading case. *Ogden v. Saunders*, 12 Wheat. 213. In that case, the discharge granted in New York was pleaded in Louisiana, to a contract made in New York with a citizen of Kentucky, following the person of the creditor, and not limited to New York, as the place of performance. In *Ogden v. Saunders*, the contract was, in the eye of law, one foreign to the sovereignty granting the discharge, while in this case it was not, though made with a citizen of another State. Same is true of *Cook v. Moffat et al.*, 5 How. 295. The Supreme Court of Massachusetts held a discharge in a case like this one a bar. *Scribner et al. v. Fisher*, 2 Gray, 43. In *Donnelly v. Clark*, the discharge was set up in a State foreign to the one where the contract was to be performed. In *Demeritt v. Exchange Bank*, 20 Law Rep. 606, the law there under discussion was one regulating procedure in State courts, and the court held such a law inapplicable to United States courts, because they were not bound by procedure laws of State courts. It is in derogation of State rights to hold that a State cannot attach incidents to a contract made and to be carried out within its limits, as well as give force and effect to it. *Bank of United States v. Lyman et als.*, 20 Vt. 666, was also cited.

CLIFFORD, J. The force and effect of the insolvent laws of a State have so often been considered, that any extended discussion of the principles originally supposed to be involved in the question under consideration would be useless, as I am of the opinion that the question presented is authoritatively settled by the decisions of the Supreme Court. All agree, I suppose, that the decisions of the Supreme Court are authority in all questions involving the construction of the Constitution of the United States; and if so, it would be difficult to maintain the proposition that they are not so in cases of this description. Whether the binding obligation of those decisions is conceded or not, in other

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jurisdictions, it must certainly be admitted in this court, and it is vain to suppose that they will not be followed here in all cases where they apply. Discussion upon the general subject to which this question appertains has become so nearly exhausted that the more important inquiry now is, as to what has been decided ; and it is not a little remarkable that most of the diversity in the recent decisions has grown out of the difficulty in answering that inquiry. One of the leading cases upon the subject is that of *Sturgis v. Crowninshield*, 4 Wheat. 122. Recurring to the facts of that case, it will be seen that the defendant was sued in this district as the maker of two promissory notes, both dated at New York and made payable to the plaintiff, and the suit was brought after he had been discharged in New York under the insolvent laws of that State, which, in their terms, applied to past as well as future contracts. He pleaded his discharge in bar of the action, and the plaintiff demurred to the plea. Certain questions arose in the Circuit Court on which the judges were opposed in opinion, whereupon the questions were certified to the Supreme Court for their final decision. Able counsel were employed on both sides in the Supreme Court, and the court decided that, since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law ; but also held that the act pleaded in the case, so far as it attempted to discharge the contract on which the suit was instituted, was a law impairing the obligation of contracts within the meaning of the Constitution of the United States ; and that the plea of the defendant was not a good and sufficient plea in bar of the action. Another case, involving the same question and some others, was also presented to the Supreme Court for decision at the same session. *M'Millan v. M'Neill*, 4 Wheat. 209. As appears from the statement of the last-named case, the contract on which the original suit was brought was made in Charleston, in the State of South Carolina, and both parties resided there at the time the contract was made ; but the original defend-

ant subsequently removed to New Orleans, in the State of Louisiana, and there obtained a certificate of discharge from his debts, under the insolvent laws of that State, which were passed prior to the date of his contract. He was also one of a firm doing business in Liverpool, and a commission of bankruptcy was issued there, both against him and his partner, and they obtained certificates of discharge. Those certificates he pleaded in bar of this action, and the plaintiff demurred to the plea. Two points were ruled by the court: first, that the circumstance that the State law, under which the debt was attempted to be discharged, was passed before the debt was contracted made no difference in the application of the principle; and, secondly, that a discharge under a foreign law was no bar to an action on a contract made in this country. Whatever diversity of opinion there may be as to the correctness of the decision in the leading case, it must, nevertheless, be admitted that the rules of law laid down in the conclusion of the opinion are plain and clear. Speaking of the other case, Mr. Justice Johnson, in *Ogden v. Saunders*, 12 Wheat. 279, says it is nothing more than this, that insolvent laws have no extra-territorial operation upon the contracts of other States; and he maintains that the principle is applicable as well to the discharges given under the laws of the States as of foreign countries, and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle. Some misapprehension existed for a time on the point, whether the final opinion delivered by Mr. Justice Johnson in that case was, in point of fact, the opinion of a majority of the court, but I do not see any ground for doubt upon the subject. He states explicitly in the outset that he is instructed by the majority of the court to dispose of the cause, and explains that the majority on the occasion is not the same as that which determined the general question previously considered. Three propositions were laid down in that case, and it is a matter not now open to controversy that they severally received the sanction of a majority of the court: 1. That the power given to the United States to pass bankrupt laws is not exclusive. 2. That the fair

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and ordinary exercise of that power does not necessarily involve a violation of the obligation of contracts *multo fortiori* of posterior contracts. 3. But when, in the exercise of that power, the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of the citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States. His statement of the question involved in the case, and the answer given to the same, are quite as explicit as the third proposition just recited. He states the case thus: the question now to be considered is, whether the discharge of a debtor under a State insolvent law would be valid against a creditor or citizen of another State who has never voluntarily subjected himself to the State laws otherwise than by the origin of his contract; and he answers the question by saying, I therefore consider the discharge under a State law as incompetent to discharge a debt due a citizen of another State; and it was upon that ground that a majority of the court determined that the plea of a discharge set up in that case was insufficient to bar the rights of the plaintiff. Attention is very properly called to the fact that the discharge in that case was granted in New York, and was pleaded in Louisiana to a contract made in New York without limitation as to the place of performance. Conceding that to be so, still the suggestion cannot have weight, because the decision of the court is placed upon the ground of citizenship; and if that be the true criterion, as it undoubtedly is, then it is clear that the place of performance is a matter wholly immaterial. That the Supreme Court intended to settle the law as laid down in the conclusion of the final opinion of Mr. Justice Johnson is placed beyond doubt by the decision of the same court in the case of *Boyle v. Zacharie*, 6 Pet. 348, Marshall, Ch. J., says in that case, that the judges who were in the minority of the court upon the general question as to the constitutionality of State insolvent laws concurred in the final opinion disposing of the case. That opinion, therefore, says the learned Chief Justice, is to be deemed the opinion of the

other judges, who assented to that judgment ; and he adds, that whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court. Whenever the question has been presented to the Supreme Court, since that opinion was pronounced, the answer of the court has uniformly been that the question depended upon citizenship ; and accordingly it was held, in the case of *Suydam et al. v. Broadnax et al.*, 14 Pet. 75, that a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States or of any other State than that where the discharge was obtained. Judge Story says, in the case of *Springer v. Foster et al.*, 2 Story, 387, that the settled doctrine of the Supreme Court is, that no State insolvent laws can discharge the obligation of any contract made in the State, except such contracts as are made between citizens of that State. To support that proposition he refers to the case of *Ogden v. Saunders*, and remarks, without qualification, that it was subsequently affirmed in *Boyle v. Zacharie*, where there was no division of opinion. Confirmation of the fact that such was his opinion, if any be needed, may be found both in his Commentaries on the Constitution and in his valuable work entitled Conflict of Laws. In the former, he says the result of the various decisions of the Supreme Court on the subject is : 1. That State insolvent laws apply to all contracts within the State between citizens of the State. 2. That they do not apply to contracts made within the State between a citizen of a State and a citizen of another State. 3. That they do not apply to contracts not made within the State. His views, however, are even better expressed in the last-named treatise, where he says : “ Under the peculiar structure of the Constitution of the United States prohibiting the States from passing laws impairing the obligation of contracts, it has been decided that a discharge under the insolvent laws of the State where the contract was made will not operate as a discharge of the contract, unless it was made between citizens of the same State ; and he adds, it cannot therefore discharge a contract made with a citizen of another State. 3 Story’s Com. on Con. § 384, p. 256 ; Story on Confl. of Laws,

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§ 341, p. 573. Chancellor Kent says the discharge under a State law will not discharge a debt due to a citizen of another State who does not make himself a party to a proceeding under the law. It will only operate upon contracts made within the State between its own citizens or suitors subject to State power; and the Supreme Court held, in *Cook v. Moffat et al.*, 5 How. 308, that State insolvent laws "could have no effect on contracts made before their enactment or beyond their territory." 2 Kent's Com. (9th ed.) p. 503. Some modification of the doctrine, as stated in the authorities cited, was attempted to be made by a majority of the Supreme Court of Massachusetts, in the case of *Scribner et al. v. Fisher*, 2 Gray, 43; and it was there held that a certificate of discharge under the insolvent laws of that State is a bar to an action on a contract made by a citizen of the State with a citizen of another State who does not prove his claim under those laws, if the contract, by its express terms, is to be performed in that State. Metcalf, J., however, delivered a very able dissenting opinion, approving the doctrine that State insolvent laws cannot discharge the obligation of contracts made with the citizens of other States. Shortly after the volume containing that decision was published, the same question came before the Circuit Court for this district, and my immediate predecessor held the opposite opinion, stating that he considered the settled rule to be, that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Additional authorities were also cited by the learned judge in support of the proposition; and it will be found upon examination that every one of them supports the point to which they were cited. *Woodhull v. Wagner*, Bald. 300; *Donnelly v. Corbett et al.*, 3 Seld. 500; *Poe v. Duck*, 5 Md. 1; *Demeritt v. The Exchange Bank*, 20 Law Rep. 606. Since that decision was made, the same conclusion has been reached by the Supreme Court of Connecticut, and also by the Supreme Court of Maine, where the whole subject has been very thoroughly examined and very ably discussed. *Anderson v. Wheeler*, 25 Conn. 607; *Felch v. Bugbee et al.*, 48 Me. 9; 9 Am. Law Reg. 104. Nothing, therefore, can be more

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certain, as it seems to me, than the conclusion, that the question presented in this case has already been settled by the Supreme Court. It was certainly so regarded by the court in *Cook v. Moffat et al.*, as well by Mr. Justice Grier, who gave the opinion, as by the chief justice, and the other justices who expressed their opinions on the occasion. According to the agreement of the parties, the defendant must be defaulted.

BANK OF NEWBURY v. JAMES W. BALDWIN.

Where a cashier of a bank took a note running to him as "cashier," without specifying of what bank, *held*, that evidence was admissible to show that, in taking the note, the cashier was acting as agent of a certain bank.

Between the original parties to a bill or note the general rule appears to be, that the facts are open to inquiry; and that an agent is not liable to be sued upon contracts made by him in behalf of his principal, if the name of the principal is disclosed to the person contracted with at the time of entering into the contract.

Where on the face of the note the person to whom it was given was designated "cashier," and it was furthermore agreed in the case that such person was in fact cashier of Newbury Bank, *held*, that the case must be viewed as if the words "cashier of Newbury Bank" had been written on the note.

THIS case was in some respects similar to the preceding, being an action of assumpsit upon a promissory note signed by James W. Baldwin. The note was in the following terms:—

"\$3,500. Five months after date I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars at either bank in Boston, value received."

The plaintiff bank was a corporation of Vermont, and the defendant, at the time of making the note and when the suit was brought, was a citizen of Massachusetts. As stated in the previous case, the defendant had, before the commencement of the suit, obtained a certificate of discharge from his debts in the Insolvency Court of Massachusetts, but the plaintiff in this case took no part in the insolvent proceedings. Defendant pleaded the general issue, and also the certificate of discharge in bar of

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the suit. It was agreed that O. C. Hale was the cashier of the Bank of Newbury at the time of the making of the note. The court said: "Two questions are presented for decision, but one of them is the same as that decided in the preceding case, and must be ruled in the same way"; and it was held, "first, that the power given to the United States to pass bankrupt laws is not exclusive; second, that the fair and ordinary exercise of that power by States does not necessarily involve a violation of the obligation of contracts; third, but where, in the exercise of that power the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States. *Ogden v. Saunders*, 12 Wheat. 213, 271; *Boyle v. Zacharie et al.*, 6 Pet. 635."

H. C. Hutchins, for plaintiff.

F. A. Brooks, for defendant.

CLIFFORD, J. Another question, however, is presented in this case which deserves to be very carefully considered. It is insisted by the defendant that, inasmuch as the promise is expressed to O. C. Hale, cashier, without any designation of the plaintiff corporation, that the law applicable to negotiable paper deems the promise to be made to O. C. Hale as the payee of the note, and that no one else can have the legal title without indorsement; and consequently it is immaterial in whom the equitable interest may be. Mere abstract propositions are of little utility in the determination of a case, unless they are based upon the actual facts, as proved or admitted by the parties. Hale was in fact the cashier of the plaintiff bank at the time the note was given, and that fact appears by the unconditional admission of the parties; and the defendant also admits, if the evidence is admissible, that, in taking the note, he was acting as the cashier and agent of the plaintiff corporation. It is clear, therefore, that the only question presented is, whether the corporation plaintiffs can be permitted to introduce evidence to show that the person named in the note in taking it acted on their account, and not in his pri-

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vate capacity. Under recent decisions in this country it cannot be doubted that if the payee had been described in the note as cashier of the Newbury Bank, the suit in this case would have been well brought in the name of the corporation. Assuming the fact to be so, the case would then fall directly within the decision in the case of the *Commercial Bank v. French*, 21 Pick. 486, and several other cases therein cited. Now it seems to me that the agreement made by the parties supplies the omission in the note, and brings the case within the principle of that decision.

Reference is made by the defendant to the case of the *Bank of the United States v. Lyman et al.*, 20 Vt. 666, as asserting a contrary doctrine. But it should be observed that there was no agreement in that case showing that the person named as payee in the note was the cashier of the plaintiff corporation. On the face of the note in this case it appears that O. C. Hall was cashier, and with the agreement superadded to what is written, I am of the opinion that the case must be viewed precisely as it would be if the words "cashier of the Bank of Newbury" had been written in the note, and on that state of the case no doubt is entertained that it would be competent for the plaintiffs to prove by parol evidence that the cashier, in taking the note, was acting as cashier and agent of the corporation. Banking corporations necessarily act by some agent, and according to the uniform usage the principal portion of their business is transacted through their cashier. There is some conflict in the authorities applicable to the particular question under consideration, and it may well be admitted that it is not easy to reconcile them, or to deduce from them a rule of universal application. Between the original parties to a note or bill of exchange, the general rule appears to be that the facts are open to inquiry, and consequently that an agent is not liable to be sued upon contracts made by him in behalf of his principal if the name of the principal is disclosed and made known to the person contracted with at the time of entering into the contract. Accordingly it was held in the case of *Watervliet Bank v. White*, 1 Den. 608, that the indorsement of a note to "E. Olcott, Esq., cashier, or order," made

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upon it at the time of the purchase of the note by the bank of which the indorsee was the cashier, had the effect to transfer the same to the corporation, it appearing from the pleadings and proof that such was the design of the transaction. *Folger v. Chase*, 18 Pick. 63; *Hartford Bank v. Barry*, 17 Mass. 94. Where individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, although they add a description of the character in which the note is given; but it was held in the case of *Brocknay v. Allen et al.*, 17 Wend. 40, that such presumption of liability might be rebutted by proof that the note was in fact given by the makers as the agent of the corporation for a debt of the corporation due to the payee, and that they were duly authorized to make such a note as the agents of the corporation; and the court say that such facts may be pleaded in bar of an action against the makers averring knowledge on the part of the payee. Numerous other cases have been decided in this and other States which must have proceeded upon the same ground as that last cited, else the principle on which they rest cannot be sustained. *Long v. Colburn*, 11 Mass. 97; *Man v. Chandler*, 9 Mass. 335; *Episcopal Soc. of Dedham v. The Episcopal Church*, 1 Pick. 372; *Emerson et al. v. The Prov. Hat Man. Co.*, 12 Mass. 237; *Ballou v. Talbot*, 16 Mass. 461; *Rice v. Gove*, 22 Pick. 158; *Shaw v. Nudd*, 8 Pick. 9; *New Eng. Mut. Ins. Co. v. Dewolf*, 8 Pick. 56; *Medway Cotton M. Co. v. Adams*, 10 Mass. 360; *Thacher v. Winslow*, 5 Mas. 58; *Taunton and So. Boston Turnpike v. Whiting*, 10 Mass. 327; *Gilmore v. Pope*, 5 Mass. 491; *Inhabitants of Garland v. Reynolds*, 20 Me. 45; *Varner v. Nobleborough*, 2 Me. 121; *Irish v. Webster*, 5 Me. 171. Morton, J., says in *Commercial Bank v. French*, 21 Pick. 490: "The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation whether a right or wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation. Where the instrument appears to be executed in the name of the principal, the form of the words is not material." *Wilkes v. Back*, 2 East, 142; *Spittle v. Lavender*, 5 Moore,

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270; *Piggot v. Thompson*, 3 B. & P. 147; Combe's case, 9 Co. 77 a; *Frontin v. Small*, 2 L. Raym. 1418; *Taylor v. Dobbins*, 1 Stra. 399; *Mott v. Hicks*, 1 Cow. 513. So also where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or private act, parol evidence was held to be admissible to show that it was an official act. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326. That case is a much stronger one than the case at bar, because the promissor had signed his name to the check without any designation of his official character, and in disposing of the case Mr. Justice Johnson says, it is by no means true, as was contended in argument, that the acts of agents derived their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed; but in the diversified duties of a general agent the liability of the principal depends upon the facts, that the act was done in the exercise and within the limits of the powers delegated. These facts, says the learned judge, are necessarily inquirable into by a court and jury. See also *Hodgson v. Dexter*, 1 Cran. 345. Although it is stated that the defendant objects to the admission of the note in evidence, still it is evident that the question is not broadly presented for decision independently of the agreed statement, because the admitted fact that the payee of the note was the cashier of the Bank of Newbury at the time of the making of the note, is as much a part of the agreed case as the note itself; so that in determining the question, that fact must be superadded to the note, else the decision of the court would turn upon something less than the whole case; and indeed the agreed statement proceeds throughout upon the ground that nothing is wanting to make out the plaintiff's case under the general issue, except proof of the fact that, in taking the note, O. C. Hall was acting as cashier and agent of the plaintiff corporation; whether that evidence is admissible or not is the question submitted to the determination of the court,

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and nothing else is submitted under the plea of the general issue. Under the special circumstances of this case, I am of the opinion that the evidence is admissible, and, according to the agreement of the parties, the defendant must be defaulted.

RHODE ISLAND DISTRICT.

JUNE TERM, 1860.

DANIEL WIGHTMAN v. THE CITY OF PROVIDENCE.

Courts are reluctant to interfere with the verdict of a jury on the ground of excessive damages, in cases, such as an action against a town for damages received in consequence of a defective highway, — because the law affords no definite rule by which the precise compensation for the injury can be ascertained.

The rule goes no further than to point out the grounds of complaint which may be taken into the account as elements of the computation, and the evidence that may be introduced to support the claim, and then the estimation of the amount of the damages is necessarily left to the jury.

The court will not interfere, except when the verdict is so large as to show that it was perverse, or the result of gross error, or that the jury had acted under undue motives or misconception.

Where a personal injury is of a character to impair the ability of the person to labor, and especially when it is of a permanent character, it often becomes necessary to inquire into the condition in life and the pursuits of the injured person, in order properly to enable the jury to estimate the damages.

Where counsel for the plaintiff, in the closing argument, adverted to facts not in proof, but the remarks were checked by the court, and the jury were instructed to confine their attention to the evidence in the case, the course of the counsel was held not to be sufficient ground for a new trial.

THIS was an action of trespass on the case to recover damages for personal injuries received in consequence of a defect or want of repair of a certain highway in the city of Providence, called College Street. In the month of February, 1856, as the plaintiff was walking upon the sidewalk of the street, he fell upon the ice which had there accumulated, injuring his arm and hand, and

otherwise causing him severe pain and suffering. The nature and extent of the injury, the character of the street, and the consequences to the plaintiff, are detailed sufficiently in the opinion of the court.

The action, according to the Rhode Island statute, was brought against the city treasurer.

The jury returned a verdict for plaintiff in the sum of four thousand dollars.

Defendants moved for a new trial upon the following grounds : first, because the damages assessed by the jury were excessive and unreasonable ; second, because the verdict was against the evidence, and the weight of the evidence submitted to the jury ; third, because the counsel for plaintiff, in his closing argument, stated facts to the jury not proved by any testimony, and argued upon the basis of those statements.

It was admitted that the street in question was a public highway.

J. M. Blake and *C. H. Parkhurst*, for plaintiff.

The rule of law is clear that the court will not set aside a verdict on the ground of excessive damages in a case of tort, unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. *Chambers v. Caulfield*, 6 East, 244 ; *Leeman v. Allen*, 2 Wils. 160 ; *Huckle v. Money*, 2 Wils. 205 ; *Creed v. Fisher*, 26 Eng. L. & Eq. 384 ; *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661 ; *Morse v. Auburn and Syracuse R. R. Co.*, 10 Barb. 621 ; Sedgwick on the Measure of Damages (3d ed.), 642 – 645, and cases cited.

The second ground for the motion is that the verdict is against the evidence and the weight thereof.

The court will not set aside a verdict as against evidence or as against the weight of evidence, where the evidence on the side of the verdict, taken by itself, is sufficient to justify the verdict, and there is conflicting evidence. *Hepburn v. Dubois*, 12 Pet. 345 ; *Wilkinson v. Greeley*, 1 Cur. 63 ; *Baker v. Briggs*, 8 Pick. 122 ; *Derwort and Wife v. Loomer*, 21 Conn. 245 ; *Wendall v. Safford*,

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12 N. H. 171, and cases cited; *Gould v. White*, 26 N. H. 178; *Cunningham v. McGoun*, 18 Pick. 13; *Johnson v. Blanchard*, 5 R. I. 24; *Glidden v. Dunlap*, 28 Me. 379.

The third ground for the motion is that the counsel for the plaintiff, in his closing argument for the plaintiff, made statements of fact which were not proved by any testimony submitted in the said case, and argued to the jury upon the basis of such statements.

To this statement we have only to say that, if any such statements were made, they were corrected at the time by the counsel for the defendant, and the jury were distinctly charged by the court that they were to confine themselves exclusively to the testimony submitted in the cause, without reference to what was stated by the counsel of either party.

J. M. Clarke, for defendant and appellant.

CLIFFORD, J. Towns are required by law in this State to keep their highways safe and convenient for travellers, and, in case of neglect to fulfil that requirement, they were declared liable "to all persons who may in any wise suffer injury to their persons or property by such neglect." R. I. Stat. 1844, 321. Those provisions extend to cities as well as towns, and include the sidewalks in the city of Providence, as well as that part of the street more particularly designed for carriages and teams, in all cases where the sidewalks have been duly laid out and constructed according to the established regulations upon the subject. R. I. Stat. 1821, p. 181; City Ordinances, p. 58. Whether the obstruction was by snow, ice, or any other material, it was held by the Supreme Court, in the case of the *City of Providence v. Clapp*, 17 How. 161, to the effect that it was incumbent on those charged with the duty of repairing highways to remove or abate the obstructions, so as to render the highway, street, or sidewalk at all times safe and convenient for travellers, regard being had to the locality of the way and its use by the public for the purposes for which it was laid out and constructed. That rule is applicable to this case, as the same statute was in force at the time of the alleged injury to the plaintiff. At the time the accident occurred the ice was several inches thick on the side-

walk. According to the testimony of the plaintiff, the street at the place where he was injured had no curbstones, and the ice extended over all the sidewalk and across the street. That there was ice upon the sidewalk was not controverted by the defendants, but they attempted to prove that it had been rendered safe and convenient for travel by sprinkling ashes or sand upon the surface of the ice; and they proved that persons had been designated by the proper authority, whose duty it was to remedy the difficulty by such means, as often as it occurred. But the testimony introduced by the plaintiff tended to show that the duty had been neglected, or that the work had been so imperfectly done as not to accomplish the object. Snow had fallen that morning to the depth of an inch or two, and the testimony introduced by the plaintiff was full and satisfactory that the sidewalk where he fell was very slippery. He passed down for some distance on the southerly side of the street, in that part of the same which is designed for carriages and teams. While so passing he met a stranger, who spoke to him and made inquiry for a third person; after answering that inquiry, he stepped on the sidewalk, still pursuing his course down the street. It is a steep street leading into South Main Street, and, when within a short distance of the latter street, he slipped and fell, which occasioned the injury described in the declaration. The account of the accident was, that he slipped, and as he fell he caught his hand under him and crushed it very badly; another witness, who was present at the time of the accident, says he slipped, and as he fell he threw out his hand to save himself, and, when the witness lifted him up, he complained of his wrist and of being badly sprained in his body. Injury was done to the wrist, but the bones of the wrist were not broken. As described by the medical witnesses, the bones of the hand were driven past the bones of the wrist or forearm, and two of the bones of the hand were broken. For a week or more he was confined to his room, and it was five or six months before he could feed or dress himself. He was a deputy sheriff, and with a business, as he testified, worth nearly a thousand dollars a year; and it was twelve months before he was able to do much writing; and he also testified that he had not done busi-

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ness since the accident occurred. On re-examination he testified that he experienced severe pain for six or eight months, and that by spells the injury continues to cause pain to the present time. He also introduced evidence showing that the fracture was a bad one, and tending to show that it might occasion a permanent injury. On the other hand, the defendants introduced several witnesses to show that the sidewalk was safe and convenient for travel, and that the earnings of the plaintiff were much less than a thousand dollars a year. During his closing argument, reference was made by the counsel for the plaintiff to certain matters not proved in the case, and in regard to which no testimony had been offered or introduced. Objection was made to that course of remark by the counsel on the other side, and it was immediately checked by the court, and the jury were instructed to confine their attention exclusively to the evidence in the case. *Excessive damages* is the next ground of complaint, and the one on which reliance is chiefly placed in support of the motion. Courts of justice are always reluctant to interfere with the verdict of a jury on that ground in cases of this description, for the reason that the law affords no definite rule by which the precise compensation for the injury can be ascertained. Where a party sustains a loss by reason of a breach of contract, he is entitled to a recompense, compensation, or satisfaction equal to the injury actually received by him from the defendant; or, in other words, he will be placed in the same situation with respect to damages, so far as money can do it, as he would have been if the contract had been performed. Injuries to property, also, may oftentimes be estimated with equal exactness; and when unattended by any circumstances recognized by law as matters of aggravation, the rule of damages is compensation, recompense, or satisfaction for the injury received. Certain other actions of tort are necessarily governed by far more indefinite principles. Where the person or character is injured, it is difficult, says Mr. Mayne, if not impossible, to fix any limit; and the verdict, therefore, is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires. Such cases, however, as the same author

well remarks, are not beyond rule, and consequently the finding of the jury is not beyond the control of the court; for if it were not so, then there could be no such thing as a new trial for excessive damages. Mayne on Damages, p. 34. New trials may, and often are, granted for that cause, but the difference between the one and the other class of cases arises chiefly out of the fact that in cases of this description no rule can be applied to the facts so accurately as to make the amount a mere matter of calculation. Hence the rule goes no further than to point out the grounds of complaint which may be taken into the account as elements of computation, and the evidence that may be introduced to support the claim; and when that is done, the estimation of the amount of the damages is necessarily left to the jury. They are to weigh the evidence and estimate the loss to the plaintiff; and inasmuch as there are no definite means of calculation by which the amount can be precisely ascertained, courts of justice will not grant a new trial except when the verdict is so large as to satisfy the court that it was perverse, or the result of gross error, or that the jury have acted under the influence of undue motives or misconception. *Gough v. Farr*, 1 Y. & J. 477. Bodily pain and suffering, in cases of this description, are part and parcel of the actual injury, for which the plaintiff is as much entitled to compensation as for loss of time or the actual outlay of money for nursing and medical attendance. Damages for bodily pain and suffering arising from physical injury, and connected with loss of time or diminished ability to labor as the direct consequence of the injury, are not exemplary or punitive in their character in any proper sense of those terms, but are the legitimate ground of damage in all cases of this description; and yet it is difficult, if not impossible, to prescribe any very definite rule by which the jury are to be governed in estimating the amount to be allowed for that cause. Successive actions may sometimes be brought for a continued wrong, as in the case of a continued trespass on land, and in all such cases the damages are limited to those sustained by the plaintiff at the commencement of the action on trial. But where, as in this case, the suit is for an injury to the person from a single act, one action only can be

brought, and consequently there can be but one assessment of damages. For that reason the jury are allowed, and it is their duty in case there is satisfactory proof that the injury is a permanent one, to take into consideration the future consequences to the plaintiff so far as respects loss of time, bodily pain and suffering, and inability to labor, or to pursue his usual avocations. Unless it were so, it might, and often would, happen that the plaintiff would be deprived of the larger portion of the compensation to which he was justly entitled, and the damages as found by the jury would be greatly inadequate to compensate him for the injury sustained. *Caldwell v. Murphy*, 1 Kern, 416; *Same v. Same*, 1 Duer, S. C. 233.

When a personal injury is of a character to impair the ability of the injured party to labor, and especially when it is of a permanent character, it often becomes necessary to inquire into the condition in life of the injured party, and also into the nature and character of his pursuits, in order that the jury may determine what the damage is from loss of time which he has received. Like injuries are supposed to occasion like bodily pain and suffering, irrespective of the condition of the injured party, but when the injury extends to loss of time or inability to labor, the law properly recognizes the well-known fact that the services of one will command and deserve higher compensation than those of another, and consequently allows the estimation of loss to be made according to the fact as proved by the evidence in the case. All, or nearly all, of those grounds of damage require the exercise of judgment and sound discretion on the part of the jury, and some of them are not of a character to admit of any very definite rule in making the estimate; and it is for that reason that courts of justice are reluctant to interfere with the finding of the jury. A verdict therefore may be larger than the court would have found, and yet it may furnish no satisfactory reason for a new trial; more than that must be shown by the defendant before the court will disturb the verdict. *Gilbert v. Burtenshaw*, Cowp. 230, 1 Grah. & Wat. On New Trials, 415.

Mere excess of damages beyond what the court would have

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found is not sufficient to support the motion, unless it be so great, after making all due allowance for difference of judgment, as to satisfy the court that the jury were actuated by passion or some undue motive, or that the verdict was the result of some gross error or misconception. Applying these principles to the present case, it is obvious what the result must be. It may well be admitted that the verdict is for a larger sum than I would have found upon the evidence; but the excess is not so great as to justify me in disturbing the verdict.

In the second place, it is insisted that the verdict is against the evidence introduced to the jury. Such motions are frequently made and seldom sustained, and it is quite certain, in the present case, that the motion is without merit. Some discrepancy existed in the testimony as to the state of the street, but the weight of the evidence clearly showed that it was in an unsafe condition for travel, and had been so for some considerable time.

One or two observations respecting the third ground of complaint will be sufficient. Certain facts were adverted to by the counsel for the plaintiff which were not in proof. But the counsel was immediately checked by the court, and the jury were expressly instructed to confine their attention to the evidence in the case. In view of the whole case, I am of the opinion that the motion for a new trial must be overruled, and there must be judgment on the verdict.

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MAINE DISTRICT.

OCTOBER TERM, 1860.

UNITED STATES v. SCHOONER PARYNTHA DAVIS.

A libel under the thirty-second section of the act of February 28, 1793, 1 Stat. at Large, p. 816, need not specify the particular trade in which the vessel was engaged at the time of the seizure; it is sufficient, as a general rule, to bring the case within the words of the act of Congress.

Where a vessel was libelled for forfeiture for breach of a license to catch codfish, by catching mackerel at a certain time and place, *held*, that parol evidence might be given of her catching mackerel at other times and places during the trip, as showing the real business of the voyage.

A fishing-vessel licensed to catch codfish cannot catch mackerel, except as bait or provision for the crew; and this incidental privilege ought to be exercised fairly and in good faith.

THIS was a libel of seizure against the schooner Parynthia Davis for a forfeiture, resulting from an alleged illegal employment of the vessel. The libel set forth that the schooner was regularly seized at Portland on the 12th of October, 1857, and that prior to the seizure she was a vessel of the United States, duly enrolled and licensed to carry on the cod-fishery, and that, being so licensed, was then and there employed in a trade other than that for which she was licensed. At the hearing it appeared that the schooner, on March 27, 1857, took out a license in the collection district of Barnstable, in the State of Massachusetts, for carrying on the cod-fishery, and was employed under that license until July 23d, when the license was surrendered and one taken out for the mackerel-fishery. The schooner held her mackerel license until September 22d, when she again surrendered it and took out a cod-fishing license. The schooner sailed from Wellfleet, September 24, 1857, and was seized October 11th at Hogg Island Roads, in Portland Harbor.

When seized, she was at anchor by the side of another fishing-schooner, and had mackerel-lines all around the waist. Some

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fifteen or twenty barrels of mackerel were found on board, and also twenty empty mackerel-barrels. Mackerel recently caught were found in wash-barrels on the deck, and there were about fifteen barrels of salt on board. The hawser and chain cable of the vessel were not such as are suitable for deep-sea fishing. No codfish were seen on board, except a few dried or pickled, apparently having been caught more than a month. The first day the boarding officers went on board no cod-lines were discovered, but on a second visit they were shown some which were brought on deck by the crew, but the lines were without sinkers. The barrels containing the mackerel were stowed away on the bilge. There were porgies for floating bait, and a mill for preparing them. Inquiry from the master and others on board the schooner elicited that they were "catching anything that came along." It was in testimony that there was a complement of cod-lines on the vessel, and everything necessary for preserving the fish when caught. The testimony showed that during a course of several days more mackerel than codfish had been caught, although several attempts had been made at various places. It was set up that the mackerel were caught to be used for bait, although it did not appear that they were used for such purpose. Several barrels of mackerel were caught at different times, but no codfish of any amount. It was shown in evidence that a portion, at least, of the mackerel were split and corned. The vessel was on her trip some sixteen or seventeen days, at the end of which, returning to Portland for water, she was seized. Nine days afterwards she was delivered to the claimant, upon giving a bond in the usual form, shortly after which she took a license for the mackerel-fishery. The district judge was of opinion that the vessel was employed, if not exclusively, at least in part, in taking mackerel, not for bait or consumption by the crew, but as the proper business of the voyage.

B. F. Hallett, for claimants.

The information is insufficient, because it does not set out what other trade, and, though in the words of the statute, are uncertain where it should be specific. *Dunlap*, Ad. 431; *The Merino*, 9 Wheat. 391. The libel having alleged a specific time and place,

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“then and there” when the vessel was so employed, the libellants can give no evidence except of employment at that time and place. *Macomber et al. v. Thompson*, 1 Sumn. 385. To work a forfeiture under the thirty-second section of the act of 1793, the vessel must have abandoned her employment in the cod-fishery and engaged in some other.

The catching of mackerel is not a trade separate from fisheries, because the act of 1793, § 4, speaks of licensing vessels for the coasting trade and other fisheries. *The Reindeer*, 14 Law Rep. 249.

The court will require the most determinate evidence that the mackerel-fishery was intentionally and exclusively carried on. *The Harriet*, 1 Story, 265. The decisions bearing on this case are *The Active*, 7 Cran. 100; *The Two Friends*, 1 Gall. 118; *The Boat Eliza*, 2 Gall. 4 – 9; *The Swallow*, 1 Ware, 13.

The intent is no part of the evidence for or against condemnation. The law does not punish the intention to defraud the revenue; there must be an unlawful act. *United States v. Riddle*, 5 Cran. 311.

G. F. Shepley, District Attorney.

The cod-fishery and the mackerel-fishery are severally “trades” within the legal meaning of the act of 1793, and each is a distinct trade from the other. *The Harriet*, 1 Story, 265; *The Nymph*, Ware, 259; *The Active*, 7 Cran. 100; *The Boat Eliza*, 2 Gall. 4; 4 Stat. at Large, 312; 5 Stat. at Large, 16.

CLIFFORD, J. Forfeiture of the vessel is claimed under the thirty-second section of the act of the 18th of February, 1793. Omitting all such parts of the section as are inapplicable to this case, it provides, in effect, that if any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited. 1 Stat. at Large, 316. As shown by the proofs, she was engaged in the mackerel-fishery, and it is insisted, on behalf of the United States, that the mackerel-fishery is an employment other than that for which she is licensed, within the meaning of the act of Congress upon which the proceeding is founded. But it

is objected by the appellants that the allegations of the libel are insufficient to support a decree of forfeiture, because it does not specify the particular trade in which the schooner was engaged at the time of the seizure. But it is quite obvious that the objection cannot be sustained. Technical rules of pleading are not so much regarded in libels of this description as in indictments and informations at common law. Where there are no technical words or phrases employed in the prohibition of the statute, it is sufficient, as a general rule, to bring the case within the words of the act of Congress on which the information is founded. Repeated decisions have established that rule of pleading in cases of this description, and it is undoubtedly correct. *The Samuel*, 1 Wheat. 9 ; *The Hoppet*, 7 Cran. 389 ; *The Merino*, 9 Wheat. 401. No such objection was taken in the District Court, and I am of the opinion it cannot prevail, especially after appearance and answer to the merits.

Looking at the testimony of the claimants alone, it would not be possible to hold that the crew were in good faith pursuing the business for which the schooner was licensed, and, when taken in connection with the testimony of the boarding officers, it clearly shows that the conclusion reached by the District Court was correct. But it is insisted by the claimants that none of the parol evidence was admissible, except that offered to prove what the employment of the vessel was at the time and place as alleged in the libel. Two answers may be given to that objection, either of which is sufficient to show that it cannot be sustained : 1. All the evidence in the case as to what was done during the trip was introduced by the claimants, and clearly they cannot now object to testimony introduced in their own behalf ; 2. Another answer, however, may be given to the objection, which perhaps will be more satisfactory ; and that is, that the testimony would have been admissible if it had been offered by the government and seasonably objected to by the claimants.

As alleged in the libel, the charge is, that, prior to the seizure, to wit, at Portland on the 10th of October, 1857, the schooner was a vessel of the United States, duly enrolled and licensed to be employed in carrying in the cod-fishery, and that she was then

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and there employed in a trade other than that for which she was licensed. Whether that charge is true or not depends upon what had been done during the trip, and obviously evidence to show what had been done was admissible to make out the charge or to establish the defence. Unless the rule was so, it might be impossible to administer justice, as any evidence that could be offered as to what had been done on a given day might, and in all probability would, be unsatisfactory. Correct pleading requires that time and place should be specifically alleged, and if prior acts during the same trip should be held to be inadmissible, great injustice might be done. Without stopping to cite authorities to this point, suffice it to say that I am clearly of the opinion that on principle the objection is without merit. Lastly, it is insisted by the claimants that the catching of mackerel is not a trade other than that for which the schooner was licensed. It is a sufficient answer to this objection, to say that the rule of law as understood in this court is settled otherwise. Judge Ware held, in the case of *The Nymph*, Ware, 259, that since the act of the 24th of May, 1828, a vessel licensed for the cod-fishery is not authorized by her license to engage in the mackerel-fishery, because that act requires a distinct license for that business. 4 Stat. at Large, 312. That case was appealed to the Circuit Court, and after a very deliberate consideration, the decree of the District Court was affirmed. Until the mackerel-fishery was, by the act of Congress, separated into a distinct employment, says Judge Story in a later case, it was frequently carried on in common with, and as an incident to, the cod-fisheries; and he adds, somewhat unguardedly, that no one can now doubt that mackerel may still be caught in the cod-fisheries, if it be not so pursued as to supersede the principal employment, but is a mere accessory or incidental business. While it must be admitted that the closing paragraph of the sentence is rather broader than the rule laid down in the previous case, still it must be weighed in connection with the residue of the opinion, and, when so read and understood, the two opinions are entirely consistent. *The Schooner Harriet*, 1 Story, 264.

Undoubtedly a vessel licensed for the cod-fishery may take

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mackerel for bait and for consumption by the crew, as provisions during the trip; and as fresh mackerel make the best bait, the crew may take them as frequently and in such quantities as it may be reasonably necessary for them to do for those purposes; and where it appears that they pursued the proper business for which the vessel was licensed, in good faith, and on the return of the vessel, or at the time of her seizure, have only such quantity of mackerel on hand as may reasonably be inferred from the circumstances to have been taken in the fair exercise of that legitimate right, the law does not authorize the forfeiture of the vessel because there happens to be some excess. They must pursue the proper business for which the vessel is licensed, and in exercising the incidental right of taking mackerel for bait and for consumption by the crew, they must act reasonably and in good faith. Such in effect is the rule laid down by the two learned judges in the cases already cited, and I am of the opinion that it is correct. Reference is made by the counsel of the claimants to the case of *The Reindeer*, 14 Law Rep. 250, as asserting a more liberal doctrine, and it cannot be denied that there are some expressions to be found in that opinion which afford some countenance to the argument. But it does not purport to overrule the prior decisions upon the subject, and, until the question is revised by the Supreme Court, I consider myself at liberty to adopt the earlier and, as I think, the better construction of the act of Congress. The decree of the District Court is therefore affirmed with costs.

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MASSACHUSETTS DISTRICT

OCTOBER TERM, 1860.

BENJAMIN BRAY v. JACOB HARTSHORN.

Where the claim rests upon the application of an old invention, process, or machine, &c., to a new use, the patent cannot be sustained.

New contrivances applied to old purposes are patentable. But particular changes may be made in the construction and operation of an old machine, so as to adapt it to a new and valuable use, when it may be the subject of letters-patent.

Such change may consist of a new and useful combination of the several parts of which it is composed; it may consist in a material alteration or modification of one or more of the several devices which enter into its construction, or it may consist in adding new devices.

Where the claim is of this kind, the patentee must distinguish the new from the old.

The claim in this case is for a new and useful method of balancing curtains in the manner and by the means described in the specification, to wit, by a new combination. It is not necessary that any one of the devices or elements so combined should be new, provided the combination is new, and produces a new and useful or a better result. The words "for the purpose," in the claim of the plaintiff's specification, were employed in combination with others, as descriptive of the operation of the described machine, and of the new and useful result it was adapted to produce, and not of any new use to which the machine was to be applied. *Held*, that the plaintiff in this case had fully complied with the requirements of the act of July 4, 1836, in regard to the description and specification of his invention.

Where evidence is given on both sides, and the verdict of the jury is satisfactory to the court, no extended argument will be made by the court in disposing of a motion for a new trial.

TRESPASS on the case for the infringement of a patent right. Plaintiff was the patentee of an invention entitled a "certain new and useful improvement in spring rollers or fixtures for the hanging and balancing of house curtains, maps, and drawings, and for other similar uses." Defendant pleaded the general issue and also filed certain special defences. Among other things he set up that the plaintiff claimed as his invention that which was not patentable; that the specification of his claim and invention was void for uncertainty, and that the same was ambiguous because it did not distinguish what he claimed as new in his invention,

from what was old. Plaintiff's letters-patent bore date the 5th of August, 1854; those of defendant, May 1, 1855.

At the trial both parties presented prayers for instructions to the jury. The instructions requested by the defendant were as follows: 1. That the claim of the plaintiff is not for a combination; 2. That the claim is for a new use of an old invention, to wit, the use of the old spiral spring in balancing a curtain in any position in which it may be placed, and is therefore void; 3. That if the claim of the plaintiff is held to be for a combination, then it is such for all the mechanical parts of the curtain-fixture as described in the specification of his patent; 4. That not having distinguished in his claim of a combination as to what parts of it are new and what old, his patent is void; 5. That there being no claim in the patent of the plaintiff that the cylinder and spring as in his specification described are new, they are therefore to be deemed old, and that if the plaintiff uses an improved spring, and not the old spring, then the defendant has not infringed; 6. That the claim of the plaintiff is void for uncertainty and ambiguity.

These requests the court refused, and instructed the jury as follows: —

1. That a mere change of form and proportion of an old machine was not sufficient to entitle a party making such change to a patent, but if the change be such as required invention, and the machine produced a new and useful or better result, then the machine thus changed is the proper subject of a patent; 2. That, by the true construction of the plaintiff's patent, he did not claim the tubular or hollow curtain-roller as new, nor did he claim the large spiral spring as new, except as provided and used in the combination described in his claim, for the purpose of balancing curtains in any position, substantially as therein set forth; 3. That what he did claim was, the providing the tubular or hollow curtain-roller with a long spiral spring within it, when the spring was used for the purpose of balancing the curtain in any position in which the curtain may be placed, substantially as described in the specification and drawings of his patent; 4. That the claim as set forth in his patent constituted a combination of

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the long spiral spring with the tubular or hollow curtain-roller, and the weighted bar or tassel, as described in the specification, when constructed and fitted as described, within the roller, for the purpose of balancing the curtains in any position, substantially in the manner described; 5. That the plaintiff claims the long spiral spring as new, when thus constructed, fitted, and used in that combination for the purpose of balancing curtains in any position, substantially as described in his patent.

Under these instructions the jury returned a verdict for the plaintiff for five hundred dollars. Motion for a new trial was filed by the defendants, and under the motion, in addition to certain reasons already set forth in his requests for instructions, alleged that the verdict of the jury was against the evidence.

William Whiting, for plaintiff.

The plaintiff's claim is for a new combination. *Foote v. Silsby*, 2 Blatch. 260. Plaintiff disclaims what he says has been previously used. The structure of the invention, its operation, and the claim in its terms, are clear and intelligible. The claim of plaintiff's letters-patent was as follows: "Providing the tubular or hollow curtain-roller with a long spiral spring within it, when said spring is used for the purpose, not merely of drawing up the curtain by its recoil, as that is not new, but of balancing it in any position in which it may be placed, substantially as herein described."

E. M. Sawyer, for defendant.

CLIFFORD, J. Several positions are assumed by the defendant in support of his motion, which will be separately considered.

Adopting the views maintained at the trial, he still insists that by the true construction of the plaintiff's patent it is for a new use of an old invention, and of course, if that be so, then the instructions to the jury were erroneous, and the defendant is entitled to a new trial. Authorities are cited to show that a patent of that description cannot be sustained, but the authorities are not necessary to support the proposition as the principle, if taken as a general rule, is universally admitted to be correct. Invention or discovery is required as the proper foundation of a

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patent, and, where both are wanting, the applicant cannot legally secure the privilege. Consequently, where the claim rests merely upon the application of an old machine to a new use or to a new purpose, or upon the application of an old process to a new result, the patent cannot be sustained, because the patentee under those circumstances has not invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others, for which *alone* a patent can be legally granted. Judge Story held nearly twenty years ago, in *Bean v. Smallwood*, 2 Story, 408, that the application of an old machine to a new purpose was not patentable, and the same principle has since been adopted in the highest court in England, and by the Supreme Court of the United States. *Kay v. Marshall*, 8 Cl. & Fin. 245 ; *Phillips v. Page*, 24 How. 167. New contrivances, though applied to old objects, are patentable, but old contrivances, whether the objects to which they are applied are new or old, are not patentable, because the mere application of the contrivance, without more, involves neither invention nor discovery, and when both those elements are wanting, no patent issued under existing laws can have any validity. Particular changes, however, may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not and could not be applied without those changes and under these circumstances and conditions, if the machine as changed and modified produces a new and useful result, it may be patented and upheld under existing laws. *Losh v. Hague*, Web. Pat. Cas. 207 ; Hindm. on Pat. 95. Such change in an old machine may consist alone of a new and useful combination of the several parts of which it is composed, or it may consist of a material alteration or modification of one or more of the several devices which enter into its construction, or it may consist in adding new devices ; and whether it be one or another of the suggested modifications, if the change of construction and operation actually adapt the machine to a new and valuable use, not known before,

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and to which the machine had not been applied, and, without the change suggested was not in any degree fitted to be applied, and actually produces a new and useful result, then the case falls within the rule already laid down, and a patent may be granted for the same and be upheld. *Phillips v. Page*, 24 How. 166; Norman on Pat. 25. Whenever the claim is of that character, it is necessary undoubtedly that the patentee should distinguish the new from the old, and point out in language intelligible to the practical mechanic in what the change consists which adapts the machine to the new use and gives it the capacity to produce the new and useful result. Recurring to the language of the specification in this case, it will be seen that the claim is not for the new use of an old machine, in any sense in which that phrase is employed or understood in the decisions of the courts. What I claim therein, as new, says the patentee, and desire to secure by letters-patent, "is providing the tubular or hollow curtain-roller with a long spiral spring within it, when said spring is used for the purpose, not merely of drawing up the curtain by its recoil, as that is not new, but of balancing it in any position in which it may be placed, substantially as herein described." Evidently the plaintiff claims a new and useful mode or method of balancing curtains in the manner and by the means described in the specification of his patent. Taking the improvement as it is described in the patent, it consists of the following elements and devices in combination. First, the tubular or hollow curtain-roller which is described in the specification as having a device capable of being to a certain extent lengthened or shortened, to suit windows of different widths; second, the weighted bar or tassel; third, the long spiral spring adapted to the tubular roller as described in the specification, and capable of balancing the curtain in any position in which it may be placed. He claims to be the original and first inventor of the combination described in his patent, and of course it is not absolutely necessary that any one of the elements or devices so combined should be new, provided the combination is new and produces a new and useful or better result. Having confined his claim to a mode of balancing curtains in the manner and by the means described, it is not suf-

ficient to defeat his patent if it produces a new and useful result, to prove that other and different modes of balancing curtains were known prior to his invention. His patent, as limited and defined, cannot be defeated, unless it be shown that, prior to his invention, curtains had been balanced substantially in the same manner by substantially the same means, or mechanism so operating as to produce substantially the same result. Respectable authorities may be found which advance the doctrine that the new use of an old machine or invention may be so different from that to which the machine has been applied, and may so clearly produce a new article of machinery that the inventor or discoverer may be entitled to a patent, but it is not necessary to decide the point at the present time, and it is accordingly dismissed with the remark that other authorities affirm that an inventor is fairly entitled to any profits arising from the unforeseen applicability of his invention as an equivalent for the risk he incurs of ill success and corresponding loss. Coryton on Pat. 63, 64. Considerable stress was laid at the argument upon the words "for the purpose" as used in the claim, and the argument assumes that the claim for that reason and on that account must be construed as one for the application of an old machine to a new purpose, and consequently that it falls within the rule that a patent issued for such a machine cannot be sustained. Granting the premises, the conclusion certainly would follow, but a full answer to that objection is to be found in the explanations already given, defining the nature of the invention, and showing that the claim is for a combination of the several devices therein described, and not of the character supposed in the argument. Those words as employed in the claim are used, in combination with others, as descriptive of the operation of the described machine and of the new and useful result it is adapted to produce, and not of any new object to which the machine was to be applied, or, in other words, the patentee introduced that phrase in connection with what precedes and follows, not as explanatory of the object to which the machine was to be applied, but as descriptive of the improvement he had made in the principles and operation of the machine for which he desired to secure letters-patent.

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It is insisted by the defendant, in the second place, that the patent is void because the plaintiff has not distinguished in his claim between what was old and what is claimed as new; but upon full consideration I am of the opinion that, by the true construction of the claim, the objection is unfounded. Most of the difficulties suggested by the defendant are directly or indirectly based on what appears to the court to be an erroneous construction of the words "for the purpose," which are to be found in the claim and which have already been explained. Those explanations, if kept in view, will aid in elucidating the matter under consideration. Former attempts to make curtain-fixtures are pretty fully described by the patentee in his specification, and he also describes the imperfections in the apparatus and the difficulties that remained to be overcome, and then explains very fully the nature of his own improvement, both as regards the objects to be attained and the means of attaining them. Having fully explained these matters, he sets forth his claim as before stated, expressly disclaiming what is old, and evidently claiming the combination of the several described devices, together with the spiral spring, as an element of the combination, when used in the manner and in the described position pointed out, to balance the curtains wherever placed; that is, whether drawn fully up or let fully down, or placed at any intermediate point, which is, according to the patent, the new and useful result to be produced by the described apparatus. Whether well chosen or not, it is obvious that the words "for the purpose" are employed to describe the manner in which the spiral spring is used, and the position when used, or, in other words, as descriptive of the principles and operation of the described combination, and not in the sense ascribed to them by the defendant. Regarded in this point of view, the language of the claim is consistent and plain to be understood, and I am of the opinion that it is the only reasonable construction that can be adopted.

In the third place, it is insisted by the defendant that the claim of the patent is ambiguous, and that the same is therefore void. Patentees are required by the sixth section of the act of the 4th of July, 1836, to describe their inventions in such full,

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clear, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to construct, compound, and use the same. Nothing need be added to what has already been said to show that the patentee has fully complied with that provision.

New trial is also asked upon the ground that the verdict of the jury is against the evidence, and the question is presented in some two or three forms. One or two observations upon this point will be sufficient. When evidence is given on both sides, and the verdict of the jury is satisfactory to the court, the parties must not expect an extended argument from the court in disposing of the motion for a new trial. Cases of real doubt, or where the court is dissatisfied with the verdict, of course are not included in that remark. In view of the explanations given and of the whole case, I am of the opinion that there was no error in law at the trial, and no reason for disturbing the verdict of the jury. The motion for new trial is accordingly overruled.

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WILLIAM R. CLARK *et al.* v. CHARLES H. PEASLEE.

Where importations were deposited by the importer in his own store, under the act of March 28, 1854, *held*, that the collector correctly required the importer to pay half-storage, under the Treasury Regulations, February 17, 1849.

The regulations of July 2, 1855, did not have the effect to repeal those of February 17, 1849.

Where there is no repealing clause, subsequent regulations only have the effect to repeal those previously existing, to the extent that the last issued are clearly repugnant to the former.

Under the Regulations of February 17, 1849, the importer, before he can use his own store for the deposit of importations, must indorse on the entry an agreement to pay the collector an amount equal to the salary of an inspector, or one half storage, and the importer must make his election in advance.

In the Treasury Regulations of July 2, 1855, the alternative provision for the payment of half-storage is dropped.

The Regulations of 1857 provide that the importer shall pay monthly to the collector such sum as the collector deems proper for the service, not less, however, than the pay of the officer in attendance.

Where an importer, under the act of March, 1854, elected to deposit the goods in his own store, *held*, that he was not deprived of that right by being required to pay half-storage,

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and that such requirement by the collector was properly made, as the store was "a private bonded warehouse," and the owner as importer was bound to pay "appropriate expenses."

When the interpretation of the revenue laws and regulations is invoked, considerable weight should be given to the practice of the government as a contemporaneous construction of the provisions under consideration.

Goods deposited in private stores by the importer are to be taken possession of by the collector, at the charge and risk of the owners; consequently the goods are in the custody of the United States, and in charge of an inspector.

ACTION of assumpsit to recover back certain duties on imports, paid under protest. The goods, consisting chiefly of fish and oil, were imported and duly entered for warehousing. The first entry was made January 23, 1855. Application in writing was made by the plaintiffs to the defendant, collector of the customs in Boston, for leave to warehouse the importation in their own store, which was granted; and on withdrawing the same for consumption, they paid twenty-five dollars and twenty cents as half-storage, in addition to the regular duties. Other entries were made by them of similar goods, and in all cases similar exactions were made of them, and were all paid under protest. All of the entries were made under the acts of Congress concerning the warehousing of imported goods, and the half-storage was claimed by the defendant under those laws, and the regulations of the Treasury Department. Suit was commenced April 1, 1859, and the declaration embraced sums paid by the plaintiffs from March 31, 1854, to August 14, 1855.

Defendant pleaded non-assumpsit, and a verdict was taken for the plaintiffs for \$1,813.35, subject to the opinion of the court, upon questions of law, and with authority to amend the verdict or enter a general verdict for the defendant. Amount was the only question to be settled if the plaintiffs were right; but if they were wrong, then the verdict was to be set aside and judgment entered for the defendant.

S. J. Thomas, for plaintiffs.

The plaintiffs, as importers, were by law entitled to the option to deposit their goods, at their expense and risk, either, 1. In any public warehouse owned or leased by the United States; or, 2. In their own private warehouse used exclusively for the storage of warehoused goods of their own importation or to their con-

signment; or, 3. In a private warehouse used by the owner, occupant, or lessee, as a general warehouse for the storage of warehoused goods.

In either case they were bound to bear the expense of depositing and keeping deposited; that is, the expense of storing. More than this the collector had no lawful authority to exact. He could not, nor could the Treasury Department for him, adopt such rules or rates as to deprive the plaintiffs of the benefit of the warehouse system. The authority conferred on the Secretary by the act of 1854 was to make rules and regulations to give effect to the act, not to deprive importers of the benefits of it. In the first and last cases, the rates must be reasonable. In the second case, the storage is the importer's own concern. If the importer elect to deposit in a public warehouse of the United States, he pays storage to the United States. But those rates must be reasonable. *Foster v. Peaslee*, October Term, 1856; Curtis, J. If, on the contrary, he elect to deposit in a private warehouse used by the owner, occupant, or lessee as a general warehouse, he pays such storage to such owner, occupant, or lessee, and not to the United States. But such storage, too, must be reasonable. If, instead of depositing in a public warehouse of the United States, or in a general warehouse provided by another, he elect as he may, to deposit in a store provided by himself, of which he is the owner, or for which, as lessee, he already pays rent, then, of course, he is not to pay storage to another who does not provide it, and no more to the United States, who is not the owner and does not provide the place than to an individual who does not.

The expense contemplated in the section under consideration, it is submitted, is plainly the expense of storing,—the expense of providing a place of deposit for the goods until they are withdrawn,—and that alone.

In this case, the goods were not deposited in either of these classes of stores. They were deposited in the plaintiff's own stores, but not stores used for the storage of warehoused goods exclusively, but stores used by the plaintiffs for goods warehoused by them, and goods not warehoused,—some of the latter which belonged to them, and others of which belonged to others. They

were not under the lock of the customs, nor in the charge of any officer of the customs, nor in the joint custody of the owner and any officer of the customs, but in the actual custody of the plaintiffs, and at most only the *constructive* custody of the collector.

The regulation invoked by the defendant, under which it is claimed importers had the option whether to pay the salary of an inspector, or half-storage, it is submitted, had no application whatever to this case. In the first place, it will be observed, this regulation was made in 1849. The exactions of which the plaintiffs complain were all made after March, 1854. The regulation purports to be made under the authority of the act of August 6, 1846, and has reference, of course, to then existing laws. Now the provisions of the act of 1846 are quite different from those of the act of 1854. By the former the importer had no option ; by the latter he had the option to warehouse his goods, at his own expense, in his own store. It was solely on the ground of this material difference that Judge Sprague, who first tried this case, granted a new trial. The new trial was granted for the reason that that distinction had in the first trial been overlooked, and expressly on the condition that the plaintiffs should waive all claim on account of exactions prior to the passage of the last-mentioned act ; and all such were stricken out. Under the act of 1846, the goods were to be deposited in public stores or in other stores to be agreed on by the collector or chief revenue officer of the port and the importer.

By the act of 1854, as before stated, the goods were to be deposited, at the option of the owner, in either a public warehouse of the United States, a private bonded warehouse, or the importer's own store, as he, the importer, might prefer and determine.

By the act of 1846, the "other stores to be agreed on" were "to be secured in the manner provided by the first section of the act" of April 20, 1818 ; that is, they were to be under the joint locks of the inspector and the importer. Not so, of course, the importers' private store mentioned in the act of 1854.

In the second place, the regulation of 1849 purports to relate to bonded warehouses, and only those. It says : "All bonded warehouses under the act of August 6, 1846, will hereafter be

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known and designated as follows." It then proceeds to speak of three classes: 1. Stores owned or leased by the United States prior to that time; 2. Stores in the possession of an importer and his sole occupancy, "which he may desire to place under the customs lock"; and 3. Stores in the occupancy of persons desirous to engage in the business of storing.

By the act of 1846, the Secretary of the Treasury was authorized to make such needful rules and regulations, not inconsistent with the laws of the United States, as he might deem necessary to give effect to that act.

In pursuance of that authority the Secretary made the above three classes of warehouses; the law had suggested but two. They were all to be bonded. The classes spoken of in the regulation of 1849 were the Secretary's classes. In 1854 the law made the classes. We have seen what they were. The first class was, stores owned or leased by the United States; the second, the importer's own store, the goods bonded, but not the store; the third, private bonded warehouses.

The difference between these acts was not wholly overlooked by the Department. I find it noticed in a general regulation, by the Secretary of the Treasury, under date of March 30, 1854. "There are," he says, "several important provisions of this act, which require a modification of the warehouse regulations of the 17th of February, 1849." No regulation touching the terms of storing in the importer's own store was, however, made, I believe, until the general regulation of 1855. Meantime, the practice of exacting half-storage, which had its origin even earlier than the warehouse system, was continued. At the former trial of this cause, a circular was introduced by the defendant, bearing date October 9, 1845, the substance of which was, that "where, at the instance and for the accommodation of the merchants, goods may be allowed by the proper officer of the customs in pursuance of law to be deposited in other than the regular public stores, *it is deemed but just and reasonable that a charge of half-storage should be exacted on all such goods, to reimburse the United States to some extent for the expense of hiring public stores, and in which the collector might*

insist on such goods being deposited, subject to the full charge for storage."

This is undoubtedly the origin of half-storage. It was instituted when the importer had no option secured to him by law, whether to use the public stores or his own, and when, therefore, the collector might perhaps impose terms as the condition of such option, and the importer as matter of convenience assented; and thus having grown up, it was continued, in derogation of the importer's right and against his will, after such option had been secured to him. It will be observed this circular does not rest the claim for the exaction upon any legal right.

If it be said the plaintiffs never applied to pay the salary of an officer instead of half-storage, there are two answers: *First*, the evidence shows there was but one condition on which the deputy collector was allowed to permit the plaintiffs to warehouse their goods in their own stores, and that was the payment of half-storage, and the plaintiffs had been repeatedly so told and so understood. *Second*, the option to store their goods in their own store, on condition of paying half-storage or the salary of an inspector, is not the option the law gave. The paragraph relied upon in the regulation of 1849 is as follows: "Before any importer shall be permitted to use his own store for class two, he shall indorse upon the entry for warehouse his written request to use such store as the place of deposit, and also indorse thereon an agreement to pay to the collector an amount equal to the salary of the inspector or one half storage, to be determined in advance by the inspector."

It will be observed that, unlike the regulation of July, 1855, this regulation does not provide that the importer may pay a just proportion of the salary of the officer, but the whole salary. Applied to a case like this, the rule is simply absurd. A merchant desires, for example, to warehouse one hundred barrels of fish. Having complied with the forms of law, he has the right, under the act of 1854, to warehouse these fish, at his own expense, in his own store; that is, he is to bear the expense of storing. There is no occasion for the services of an officer. He has given the required bond. The government is secured. There can

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be no conflict between him and the owners of other warehoused goods, for he has no other.

The plaintiffs were bound to bear the expense of storing; that is, the actual expense. The case was similar to cases under the debenture acts. There, as in this case, the importer gave bond, and took his goods to his own store, and then kept them till he was prepared to export them. No charge was ever made or claimed for the service of an officer, and of course none for storage. And if there had been any right to charge for the service of an officer, the charges in this case were wholly disproportionate. The money was paid under a controlling necessity arising from the circumstances under which the money was demanded, and it may be recovered back. *Elliot v. Swartwout*, 10 Pet. 137.

C. L. Woodbury, for defendant.

Was the regulation of the Secretary of the Treasury referred to in accordance with existing laws? As to the authority of the Secretary to regulate the warehouse system. 10 Stat. at Large, 273. He was to make such regulations, not inconsistent with the laws of the United States, as he might deem necessary for the due execution of this act. The rates of storage were to be fixed by the Secretary of the Treasury, and were left to his regulations by this act. 10 Stat. at Large, 270. "Goods subject to duty . . . may be deposited at the option of the importer, at his expense and risk in," &c. The "option given the importer in this statute was between the three classes of warehouses described in the section, and did not concern "his expense and risk." There is no pretence that this option was denied to the plaintiffs in fact or in theory; it is only insisted by the plaintiffs that they had a right *to use their own stores without paying anything*. The privilege of warehousing goods in bond has always been coupled with the condition that it should be at the expense and risk of the importer. Warehouse Act 1846 says, "at the charge and risk of the importer." § 56 Revenue Act 1799 says, "at the charge and risk of the owner." The act of 1841, § 6, authorizes the Secretary of the Treasury "to regulate the rates of storage." The power here granted was extended with the enlarging of the warehousing system in 1846, § 5, "To

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make regulations not inconsistent with the laws, to give full effect to the provisions of this law, and to secure a just accountability." These several acts are to be construed together to constitute the whole warehousing system of the United States, and only those parts which are repugnant to later statutes are to be regarded as repealed.

The *right to regulate the rates of storage* granted in 1841 is not repugnant to any of the other powers given the Secretary by subsequent statutes, and exists in full force. The revenue from storage is apportioned by the United States. See act March 3, 1849, § 4. The fact of the expense of the warehousing being a charge on the owner of the goods, and the right of the Secretary to regulate the rates of storage being thus shown to exist, there only remains to be considered, whether the government was put to any *expense* whatsoever in the case at bar, so as to justify the levying of a rate where the store class two was used. The custody of the goods is in the United States during the period of warehousing. Act of 1846, § 1. Duties to be paid in cash. Whenever the owner shall make entry for warehousing, "the goods *shall be taken possession of by the collector* and deposited in public store or other stores, &c., *there to be kept*, at the charge and risk of the owners, &c., and subject to their order on payment of proper duties and *expenses*." The mode of keeping is prescribed in various acts, the objects being safe-keeping, prevention of frauds, and the retaining of the actual goods until the duties are paid. Act 1818, § 5, act 1846, § 3, describe offences which may be committed as to these goods, and from which they are to be protected; act 1846, § 5, "to secure a just accountability" for the goods. The Treasury Regulations of June 26, 1854, direct the mode of doing this, all of which are distinctly part of the expense of the warehousing in that division which relates to *custody*, and occurred in the case at bar. There is no pretence that custody and delivery service were not performed as to the plaintiffs' goods by the warehousing department of customs. The jurisdiction of the Secretary to establish a rate of storage, and the rate being shown, and the fact that there was a custody service performed in consequence of the warehousing of plaintiffs' goods, the further fact

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remains that under the term "half-storage" the Secretary classified and collected the expenses of custody and delivery of the goods. See Treasury Regulations, February, 1849, where the option given to the importer is to pay an absolute officer or custodian's salary, or "half-storage," as a composition; and again, see Treasury Regulations, July 2, 1855, where half-storage is disused as a composition, and a division of the officer's salary among the private stores substituted. The term "storage" always has been held wider than the word "rent," and certain responsibility for care and safe-keeping devolves on warehousemen, not known or connected with those who rent stores to others. The word "half-storage," therefore, literally expresses a custody fee, — the *safe-keeping*. See Simmond's Dictionary of Commercial Terms, Webster's Dictionary, STORAGE. *Bissac v. De Fontaine*, 2 Blatch. 121.

Again, had the duties been paid in cash, then no custody would have been required from the government; it was the use of the privilege of warehousing which put the government to the *expense* of custody in order to execute the existing laws; and by statute this expense was to be at the expense of the importer. The Secretary of the Treasury having jurisdiction, and there having been a custody service performed by the customs at the warehouse of the plaintiffs, there was no exaction in compelling the plaintiffs to make their election under the Treasury Regulations, February, 1849; and the fees were legally received by the collector.

CLIFFORD, J. Considering the nature of the question, it is evident that it cannot be satisfactorily solved without a careful review of the acts of Congress concerning the warehousing of imported goods, and of the principal regulations and circulars of the Treasury Department upon the subject.

Warehousing, as a system, was established in the United States by the act of 6th of August, 1846. 9 Stat. at Large, 53. Among other things, the first section provides, that upon the failure or neglect to pay the duties within the period allowed by law, or whenever a warehouse entry shall be made in the prescribed form, the importation "shall be taken possession of by the collector," and be deposited in "the public stores or in other stores," to be

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agreed on by the collector and the importer, owner, or consignee ; and by the same section, such stores are required to be secured in the manner provided for by the first section of the act of the 20th of April, 1818, entitled " An act providing for the deposit of wines and distilled spirits in public warehouse." Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be kept in the place of deposit at the charge and risk of the owner, importer, or consignee. Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses ; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period ; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector ; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties ; nor for transportation or exportation, except by paying *the appropriate expenses*. Most of the provisions of the act are general in their phraseology, and doubtless were made so, because the system was new and untried in this country ; and they were necessarily framed and passed without the light of experience. Details, for the most part, were apparently avoided, but the fifth section authorized the Secretary of the Treasury, from time to time, to make such regulations, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. By virtue of the authority conferred under that provis-

ion, the Secretary of the Treasury, on the 17th of February, 1849, promulgated an extended circular of instructions and forms, in place of those previously issued, with a view to enlarge the benefits of the warehouse system in this country. Treas. Cir. & Dec., by Ogden, p. 118. Those regulations greatly advanced the system by supplying important details, and prescribing the mode in which the system was to be carried into effect.

Some few details, however, were prescribed in the act itself, which must not be overlooked in this investigation. Importations in warehouse were assumed to be in the possession and under the control of the collector, and were to be kept at the charge and risk of the owner, importer, or consignee, and when withdrawn from warehouse, *the appropriate expenses* were to be paid by such owner, importer, or consignee. "Appropriate expenses" are the words of the act, but the expenses are in no way defined, except by necessary implication, arising from the obligation imposed of keeping the merchandise. Custody and control of merchandise in warehouse necessarily involve the expense of storage, superintendence, cartage, and drayage. All of these elements of charge are obviously included in the term "appropriate expenses," but the amount is not prescribed, and was necessarily left to be ascertained under the regulations of the Department.

Moneys derived from that source are recognized by the act of the 3d of March, 1841, as public moneys, and collectors are required to pay the same into the treasury of the United States. 9 Stat. at Large, 349; *United States v. Walker*, 22 How. 313. Bonded warehouses, under the regulations of the 17th of February, 1849, were divided into three classes: 1. Public stores, or stores owned by the United States, or leased by them prior to the date of the regulations; 2. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the occupant, for the purpose of storing importations of the importer; 3. Similar stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Such classification was not, in terms, required by the act under consideration; but, in view of the explanations already given, it may be assumed that it was fully authorized by the fifth section.

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Looking at the details of those regulations, and comparing them with the provisions of the act of the 28th of March, 1854, it will be seen that many of the latter were substantially borrowed from those regulations. Changes, undoubtedly, were made, and some entirely new provisions were enacted; but, in many respects, there is a marked similarity between the old regulations and the new law upon the same subject. All merchandise subject to duty might be warehoused under the act of 6th of August, 1846; but the regulations contained a provision that perishable articles and gunpowder, fire-crackers, and other explosive substances, should be sold forthwith, or at the earliest day practicable, which rendered the privilege valueless in respect to all such articles; and the first section of the new law accordingly excluded those articles altogether from the benefit of the system. Other imported goods subject to duty, and which have been duly *entered* and *bonded* for warehousing, may be deposited, at the option of the owner, importer, or consignee, at his expense and risk, in any public warehouse owned or leased by the United States, or in the private warehouse of the importer, the same being used exclusively for the storage of warehoused goods of his own importation or to his consignment, or in a private warehouse used by the owner, occupant, or lessee, as a general warehouse for the storage of warehoused goods, subject to the express conditions stated in the act, and such as are necessarily to be implied from other provisions. Such selected place of storage must be designated on the warehouse entry at the time of entering the merchandise at the custom-house.

But there are other and more material conditions expressly or impliedly annexed to the option given to the owner, importer, consignee, or agent, which it becomes important to notice. Warehouses for the deposit of imported goods are divided into two classes, public and private; but of the latter class there are two kinds, as already described. Importers, under that act, can have no option to deposit any importation in a public store unless such a store be owned or under lease by the United States, because one of the main purposes of the act was to discontinue the use of all such stores for warehousing, and to provide for the

establishment of private bonded warehouses. Existing leases were to be cancelled at the shortest period of their termination, and new leases were forbidden at ports where there existed private bonded warehouses. Right of option, therefore, so far as public stores are concerned, must be considered as limited to cases where such stores were owned or under lease by the government. Conditions more express, however, in respect to the right of option to deposit imported goods in private warehouses, are to be found in the proviso annexed to the provision conferring the right. Stores must be first constituted private warehouses for the storage of warehoused goods within the meaning of the act, before any such option exists at all in respect to such stores.

Private warehouses, according to the first proviso of the section, must be used solely for the purpose of storing warehoused goods, and must have been previously approved as such by the Secretary of the Treasury, and have been placed in charge of a proper officer of the customs, who, together with the owner and proprietor, shall have the joint custody of all the merchandise stored in the warehouse ; and all the labor on the goods so stored must be performed by the owner or proprietor under the supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. Cellars and vaults of stores for the storage of wines and distilled spirits only, and yards for the storage of coal, mahogany, and other woods and lumber, may, at the discretion of the Secretary of the Treasury, be constituted bonded warehouses for the storage of such articles under the same regulations and conditions as are required in the storage of other merchandise ; but the cellars or vaults must be exclusively appropriated to the storage of wines and distilled spirits, and have no opening or entrance, except from the street, and be under the separate locks of the custom-house and of the owner or proprietor.

Subject to these conditions and qualifications, the right of option undoubtedly is conferred by the act, but it is a mistake to suppose that it exists in the unrestricted and unqualified sense set up in the argument. Government had no public stores,

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except such as were already filled with imported merchandise ; and in order to secure the right to deposit their importations in private warehouses, the plaintiffs found it necessary to comply with the conditions annexed to its enjoyment. Other differences exist between the act of the 6th of August, 1846, and that of the 28th of March, 1854, and one or two more of them may be profitably mentioned in connection with the question involved in this case.

Private warehouses might be agreed on between the collector and importer, under the former, subject only to the condition that the same should be kept under the joint locks of the custom-house and the importer, not in terms forbidding the use of the building for other purposes ; but the latter expressly requires that private warehouses shall be used solely for the purpose of storing warehoused goods, and the application must not only have been previously approved by the Department, but the store must be under the charge of a proper officer of the customs. Provision is wanting in the act of the 6th of August, 1846, to save the government harmless from risk, loss, or expense in keeping the importation in private warehouse ; but the third section of the latter act provides, that before any store or cellar, owned or occupied by private individuals, shall be used as a warehouse for other merchandise, the owner, occupant, or lessee shall enter into bond exonerating and holding harmless the government and its officers from any such risk, loss, or expense.

Authority to establish, from time to time, such rules and regulations, not inconsistent with the laws of the United States, as he might deem to be expedient and necessary, was also conferred upon the Secretary of the Treasury by the ninth section of this act. Pursuant to that authority, additional regulations and forms were framed on the 2d of July, 1855, and promulgated on the same day, to give effect to the provisions of the several acts of Congress establishing and extending the warehouse system. Some alteration is made in the classification of warehouses, under these regulations, which must be briefly noticed. Class one is stores owned by the United States, or hired by them prior to the date of the instructions, the leases of which have not yet

expired or been cancelled. Classes two and three are the same as in the previous regulations, and need not be further noticed. Class four consists of yards and sheds of suitable construction, which, by the regulations, are allowed to be bonded in the manner prescribed for other depositories, and used for the storage of wood, coal, dye-woods, molasses, sugar in hogsheads and tierces, railroad, pig, and bar iron, chain cables, and other articles specially authorized. Bonded yards must be enclosed by substantial fences, with gates provided with suitable bars and other fastenings, so as to admit of being secured by customs locks, and must be used exclusively for the storage of the above-named goods. Sheds, also, must be provided with suitable fastenings, and be secured by the different and separate locks of the occupant and of the customs. Cellars and vaults of stores occupied for general business purposes may, under certain prescribed conditions, be used by the owner or lessee as bonded warehouses of class two, for the storage of wines and distilled spirits only and exclusively of his own importation. Neither stores, yards, sheds, cellars, nor vaults are private bonded warehouses, within the meaning of the act of Congress, until they are constituted such by the sanction of the proper authorities.

Merchants or other persons desirous of having any building constituted a private bonded warehouse of the second or third class must apply to the collector of the port in writing, describing the premises, the location and capacity of the same, and setting forth the purpose for which the building is proposed to be used; as, whether for the storage of merchandise imported or consigned to himself exclusively, or for the general storage of merchandise in bond. Examination of the premises is then directed, and a report of the particulars required to be made by the proper officers in writing. On the receipt of the report, it is the duty of the collector to transmit the same to the Department, together with the application of the party, and certain required certificates, and a statement of his own views and opinion. Decision is then made by the Secretary of the Treasury, and, if the application is granted, the owner or occupant is then required to enter into a bond, of a prescribed form, in such penalty and

with such security as the collector may deem proper. Applications for the bonding of yards and sheds as warehouses must be made in a similar manner, and under like regulations. Reg., July 2, 1855, p. 9. Express stipulation is contained in the prescribed form of the bond that the obligor will pay the salary of the officer in charge of the goods, or such part of the salary as may be required in pursuance of the regulations of the Treasury Department.

Merchandise in warehouse was covered by a bond, under the act of the 6th of August, 1846; but the place of deposit was only secured by the joint locks of the customs and of the owner or occupant, under the superintendence of the officer in charge. Places of *deposit* now, as well as the goods deposited, must also be covered by a bond, so that all such depositories, before the goods are placed within them, are in point of fact private bonded warehouses, as described in the act of Congress. Foreign merchandise received into public stores is declared, by the act of the 3d of March, 1841, to be subject, as to the rates of storage, to regulations by the Secretary of the Treasury; but the charge on that account cannot exceed the usual rate at the port. 5 Stat. at Large, p. 432; Treas. Cir. and Dec., by Ogden, p. 132, § 35; Reg., July 2, 1855, p. 3; *Foster v. Peaslee*, Cir. Court, Mass. Dist., October Term, 1856. Rate of storage allowed to be charged under the regulations of the 17th of February, 1849, for the privilege of warehouse in stores of classes two and three, and for the time of the inspector in superintendence, was a sum equivalent to the pay of such officer, or one half of the amount which would accrue as storage on the goods, if stored at regular rates in a public store. Other regulations and instructions upon the same general subject have been issued since those were promulgated.

Special reference is made by the plaintiffs to the regulations of the 2d of July, 1855, and they insist that the last-named regulations had the effect to repeal those that previously existed, so far, at least, as respects the rate of storage allowed to be charged in cases of this description. Direct repeal is not pretended; and the rule is, where there is no repealing clause, that the subse-

quent regulations only have the effect to repeal those previously existing, to the extent that those last issued are clearly repugnant to the former. *Dwarris on Stat.* 533; *United States v. Walker*, 22 How. 311. Half-storage, it is admitted, was a proper charge, under the regulations of the 17th of February, 1849; and the admission is a very proper one, because the regulations expressly require the importer, before he can use his own store for such deposit, not only to request such use, but also to indorse on the entry an agreement to pay the collector an amount equal to the salary of the inspector, or one half storage, and the importer was required to make his election in advance. Under the regulations of the 2d of July, 1855, the provision for store class two is, that for the time of the customs officer necessarily required in attendance at such store, the proprietor shall pay monthly to the collector of the port a sum equivalent to the pay of such officer, but the alternative provision for the payment of half-storage is dropped. Unexplained and separated from the other regulations *in pari materia*, the provision would seem to imply that the collector must in all cases exact a sum equal to the full salary of the officer in charge, which, in most conceivable cases, would be much greater than half-storage. That provision is made more stringent in the regulations of the 1st of February, 1857, which provides that the proprietor shall pay monthly to the collector of the port such sum as he (the collector) may deem proper for the service, not less, however, than the pay of such officer. *Gen. Reg.* p. 211. Appropriate expenses were authorized to be charged, and required to be paid, under the act of the 6th of August, 1846; but the charge is described in the regulations of the 17th of February, 1849, as one "for the privilege" and for the "time of the customs officer necessarily employed in attendance at such store." Goods duly entered for warehousing under bond may, according to the act of the 28th of March, 1854, continue in warehouse without the payment of duties, for a period of three years, and may be withdrawn for consumption on due entry and payment of the duties and charges, or upon entry for exportation within the same period, without the payment of duties; and the provision is, that in the latter case the goods shall be subject

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only to the payment of such storage and charges as may be due thereon.

Storage and charges, therefore, are the words of the last-named act, but the language of the regulations is, "for the time of the customs officer necessarily required in attendance at such store." Those regulations, however, expressly recognize half-storage as a proper charge in cases where liberty is granted to the importer after entry to take the whole or any part of the goods from the vessel by paying the duties on a withdrawal entry for consumption. Payment of one half storage for one month is expressly required under those circumstances, and the same regulations provide that charges for storage, labor, and other expenses, accruing on the goods, shall not exceed the regular rates for such objects at the port. Unless the charges for storage can be allowed to exceed the regular rates at the port, it is difficult to see how an arbitrary rule requiring the collector to exact in all cases a sum equal to the full salary of the officer in charge could be sustained. One officer, under the regulations first issued, might have as many cellars in charge as in the judgment of the collector he could superintend efficiently, not exceeding six, and the same provision is retained in the subsequent regulations in the same words. Stores of class three were expressly excluded from that rule under the first regulations, and the prohibition was retained in those subsequently adopted, and made to include classes three and four. Class two was not within the prohibition, but the regulations of 1855 provided that, where one officer had charge of more than one warehouse of the second class, or more than one cellar or vault, the amount to be contributed by each must be agreed on by the owners or occupants and the collector. Authority to make such agreements was not conferred by the regulations of 1849, and the provision was changed in those of 1857, so that the amount to be contributed by each must be determined by the collector; and an agreement in writing must be made in all cases for the payment of the compensation of the officer.

Collectors are authorized to accede to these arrangements when the circumstances render the arrangement reasonably prac-

licable, and the public interest will not be prejudiced by it ; but it is necessarily in their discretion to determine those preliminary inquiries.

Comparing the acts of Congress touching the matter in question, and the several regulations upon the same subject, one with another, it is quite obvious that the several provisions were all intended to accomplish the same general purpose. Warehoused merchandise is required to be kept by the government, and the keeping involves appropriate expenses, and the object of those provisions was to supply the means to defray those expenses and save the government harmless. Differences of phraseology undoubtedly are noticeable ; but those differences have respect to matters of detail, and not of principle or substance. Importers, under the first regulations had, in express terms, an election whether to pay a sum equivalent to the salary of the officer in charge, or one half storage at regular rates, in the public stores ; and, taken as a whole, I am of the opinion that the subsequent regulations do not repeal that provision. Expressions are certainly to be found in the subsequent regulations which, if taken separately, would strongly support the view that collectors are required in all cases to exact an amount equivalent to the salary of the officer in charge ; but it is not possible to support the regulations at all, if that be their proper construction, for two reasons. Regarding the charge as storage and as an arbitrary exaction, then it would be contrary to law, because in most cases it would exceed the regular rates at the port ; but if regarded as payment of the salary of the officer in charge, then the officer receiving it would incur a penalty of two hundred dollars. 1 Stat. at Large, 680. Difficulties so formidable cannot be overcome, and consequently the construction assumed by the plaintiffs must be rejected. Where the interpretation of the revenue laws and regulations are involved, considerable weight should be given to the practice of the government as a contemporaneous construction of the provision under consideration. When the subsequent regulations were issued, the practice was not changed, but continued the same ; and, as a general remark, it may be said that it has never been changed to the present

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time. Full confirmation of the last remark, if any be needed, is found in the abstract of decisions forwarded to the collectors of the customs on the 30th of June, 1857, by the Secretary of the Treasury. On that day certain additional instructions were issued to the collectors, and the Secretary took occasion to subjoin an abstract of decisions on questions under existing revenue laws. Among the abstract of decisions is one in respect to "storage in private stores"; and the instructions say, "It has been decided that, in cases where goods are stored under bond in a private store, the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or one half of the amount which would accrue as storage on the goods so stored if placed in public store, the importer to make his selection at the time of placing the goods in store." All of the collectors, it is believed, have conformed to that decision since it was made, and, in view of all the provisions upon the subject, it is difficult to see what other rule can consistently be adopted, except when the arrangement is made for one officer to have charge of more than one warehouse, as before explained. Warehouse Manual, by Bruce, p. 205.

Several grounds are assumed by the plaintiffs to show their right to recover, but it is clear, from the explanations already given, that none of them can be sustained. 1. They insist that, under the act of the 28th of March, 1854, they had a right to elect to deposit the importations in question in their own store, and that they were virtually deprived of that right by being compelled to accept the condition to pay half-storage to secure the enjoyment of the right. Sufficient answer to this complaint has already been made in the previous explanations. Government had no public stores which were not full, and the plaintiffs had to comply with the regulations in order that their own stores might be constituted "private bonded warehouses." Election *was* made by them, and they *have* enjoyed the right, and, in the language of the law, must pay the appropriate expenses. 2. In the second place, they deny that there were any expenses, but the error of this assumption has already been shown, and the explanations need not be repeated. 3. Lastly, they insist that, if the

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collector had a right to demand anything, it was a sum equivalent to the salary of the officer in charge, and not half-storage, and that no such demand was ever made. Half-storage, it is admitted, is much less than the salary of the officer, but the proposition is, that half-storage could not be exacted under the regulations; and, although the collector might have demanded a much larger sum, still, as the sum received could not be legally exacted in that form, they have a right to recover it back in an action for money had and received. After full consideration, I am of the opinion that no part of the proposition can be sustained. Half-storage was properly demanded under the regulations; but if the collector accepted a less sum than he was entitled to receive, the plaintiffs in this form of action could not recover it back merely because the sum paid was characterized by a wrong name. In view of the whole case, I am of the opinion that the plaintiffs are not entitled to recover; and, under the agreement, and notwithstanding the verdict, there must be judgment for the defendant.

RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1860.

ANDREW H. WARD AND WIFE *et al.* v. THE NEW ENGLAND
SCREW COMPANY.

Inasmuch as the legislature of a State may confer upon the courts the power of granting licenses for the sale of the estates of minors, and the investment of the proceeds, it may, it seems, also exercise the power directly by special act.

Such act is remedial, and cannot be distinguished in principle from a general law upon the same subject.

In this case the act of the legislature was not an exercise of the power of eminent domain.

A guardian petitioned the legislature for leave to sell a portion of the minor's estate to a town, "to erect a pest-house upon." Leave was granted by special act to sell the land

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"for the said purpose," and to invest the proceeds for the benefit of the minors ; and the act, moreover, provided that the deed should "vest in the purchaser all the right, title, and interest" that the parent of the minors had in the estate. *Held*, that the guardian was authorized by the act of the legislature to sell all the right, title, and interest in the property which the parent of his wards in his lifetime possessed, and to make and execute a sufficient deed for that purpose.

Pursuant to that license a conveyance of the land was made to the town treasurer or his successors in office forever, "to erect a pest-house upon," to enjoy "in the manner aforesaid," "discharged from all manner of encumbrances," and in the granting clause it purported to be an absolute and full conveyance of the land, without condition. *Held*, that the words "to erect a pest-house upon" were merely descriptive of the use to which the town intended to put the land, at the time of purchase, and were not intended as a condition in the grant, or a limitation of the estate conveyed.

Whether conditions in a conveyance be precedent or subsequent, as there are no technical words to distinguish them, is a matter of construction, and depends upon the intention of the party creating the estate.

Conditions subsequent are not favored in law, and must be strictly construed.

The habendum of a deed was as follows: "To have and to hold the said bargained and granted premises with all the privileges and appurtenances thereto belonging, or in any wise pertaining, for the use aforesaid, forever." *Held*, the words "for the use aforesaid" could not be construed as a condition in the grant, or a limitation to the estate.

THIS was an action of trespass and ejectment to recover possession of a tract of land situated in the southerly part of the city of Providence. Special pleas were filed by the corporation defendants, setting up title in themselves. To each of these pleas the plaintiffs filed a replication traversing the matters of fact set forth in the pleas, and tendering an issue to the country. They also filed a special replication controverting the title set up by the defendants, and setting up a title in themselves to a moiety of the premises by descent in regular succession, through one George Field, and to the other moiety by virtue of a quit-claim deed from one Mary Manchester, who was the sister of George Field. George and Mary Field were the children and heirs of Isaac Field, who died in 1781; and the land in controversy, together with other real estate, descended to them at the decease of their father, as tenants in common. George Field subsequently died, leaving one son as his sole heir, who also died, leaving as his lawful heirs two daughters, Anna H. and Mary G., who were plaintiffs in this suit. Mary Field married Isaac Manchester, who died, leaving her a widow; and on September 21, 1855, she, in consideration of ten dollars, released all her title in the premises to Anna H. and Mary G., to whom, as the plaintiffs alleged,

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the other moiety descended, in regular succession, from George Field.

On the other hand, the title of defendants, as disclosed in the plaintiffs' replication, was also derived through George and Mary Field, to whom the premises descended at the decease of their father. He died intestate, leaving two minor children, George and Mary. Their mother, Martha Field, administered upon the estate of their father, and was appointed their guardian. As administratrix and guardian, she petitioned the General Assembly of the State for authority to sell a portion of their real estate, which petition was granted at the session held at Bristol, on the fourth Monday of August, 1785; and, pursuant to the authority so granted, she conveyed the land in controversy to the town of Providence, under whom defendants claim title. The following was the act of Assembly:—

“Whereas Martha Field of Providence, in the county of Providence, widow and administratrix of the estate of Isaac Field, late of said Providence, deceased, and guardian to the heirs of the said estate, preferred a petition, and represented unto this Assembly, that the committee appointed by the town of Providence, to procure a convenient place to erect a small-pox house for the use of said town, having made choice of a remote corner of the real estate of the said deceased, adjoining Providence River and Hawkins Cove, so called, as the most commodious spot within the bounds of the said town, for the said purpose, *have applied to her to sell about two acres and a half of the said land to the said town;* and that she is desirous of accommodating the said town, *and the said land is of but very little consequence to the said estate, the soil being barren;* and thereupon, the said Martha Field prayed this Assembly to empower her to sell the said land to the said town for the said purpose.

“On consideration whereof, be it enacted by this General Assembly, and by the authority thereof it is enacted, that the prayer of said petition be granted; that the said Martha Field be, and she is hereby, authorized to make sale of the said two acres and a half of land for the said purpose; that a deed thereof, made and executed pursuant to this act, shall vest in the

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purchaser all the right and interest of the said Isaac Field in and to the same; that the money arising therefrom be appropriated to the use of the said heirs; that the said sale be under the direction of the town council of Providence; and that she account with the said council for the appropriation of the money."

Omitting unnecessary portions, the deed was in the following terms: —

"To all people unto whom these presents shall come: I, Martha Field of Providence, county of Providence, State of Rhode Island and Providence Plantations, widow, send greeting:

"Know ye, that I, the said Martha Field, widow, by the authority given to me by the General Assembly of the said State, at their session held at Bristol, on the fourth Monday of August, A. D. 1785, to sell and convey to the said town of Providence a certain piece of land for the purpose of erecting a pest-house upon; for and in consideration of the sum of one hundred and nine Spanish silver milled dollars and three eighths of a dollar, in hand before the ensealing hereof, well and truly paid by James Arnold, Esq., of said Providence, in the county and State aforesaid, town treasurer of said town, the receipt whereof I do hereby acknowledge, and myself therewith fully satisfied, contented, and paid, and thereof and of every part and parcel thereof do exonerate and acquit and discharge him, the said James Arnold, his heirs and successors, as town treasurer of the said town, forever, by these presents.

"Have given, granted, sold, conveyed, and confirmed, and by these presents do freely, fully, and absolutely give, grant, sell, convey, and confirm unto him, the said James Arnold and his successors in office as town treasurer of said town of Providence, forever, in trust for said town, a certain piece or tract of land lying and being in the town of Providence aforesaid, and is butted and bounded as followeth: —

"To have and to hold the said granted and bargained premises, with all the appurtenances and privileges thereto belonging or in any wise appertaining to him, the said James Arnold and his successors in the office of town treasurer of said town of Providence, for the use aforesaid forever.

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“ And I, the said Martha Field, for myself, my heirs, executors, and administrators, do promise, covenant, and grant to and with the said James Arnold, his successors in office as aforesaid, that I have good right and lawful authority to grant, sell, bargain, convey, and confirm the said bargained premises in manner as aforesaid. And that the said James Arnold and his successors in the office of town treasurer, in trust for the said town of Providence, shall and may from time to time, and at all times forever hereafter, by force and virtue of these presents, lawfully, peaceably, and quietly hold, occupy, possess, and enjoy the said demised and bargained premises in manner as aforesaid, with all the privileges and appurtenances thereto belonging, freely and clearly acquitted, exonerated, and discharged from all manner of encumbrances, of what name or nature soever, that might in any measure obstruct or make void this present deed.

“ Furthermore, I, the said Martha Field, for myself, my heirs, executors, and administrators, the above demised premises to the said James Arnold, his successors in office as aforesaid, against the lawful claims or demands of all persons, forever will warrant and defend by these presents.”

It was claimed by the plaintiffs that the guardian of George and Mary Field was authorized only to convey the premises to the town of Providence as a site for the erection of a small-pox house for the use of the town, and that, by the true construction of the deed and act of Assembly authorizing the same, the land in controversy was conveyed for that purpose only, and upon the implied condition that it should revert to the minors whenever the town of Providence ceased to use it for such purpose. They further alleged that the city of Providence, successors to the town of Providence, had long ceased to use and occupy the premises, and conveyed the same to the defendants, who had appropriated them to a use different from that specified in the deed.

To the special replication the defendants demurred, and the plaintiffs joined in the demurrer. On the part of the defendants it was insisted that the deed of Martha Field vested in the town of Providence an absolute estate in fee simple, clogged by no condition or limitation.

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G. H. Brown, for plaintiffs.

A contingent interest in the estate remained in the owners at the time of the conveyance, entitling them or their heirs to the possession thereof, whenever the same ceased to be used for the purposes expressed in the act and deed. *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 Pick. 308; *Clapp v. Stoughton*, 10 Pick. 463.

Were this the case of a common purchase, authorities are not wanting tending to show that the words employed in the habendum of this deed created a conditional fee. 2 Co. Litt. 203 b, § 328; 4 Kent's Com. 132; 2 Greenl. Cruise (2d ed.), 729; 2 Bl. Com. 154, 155; 3 Greenl. Cruise (2d ed.), 432; *Wheeler v. Walker*, 2 Conn. 196; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Police Jury v. Reeves*, 18 Martin, 221; *Stuyvesant v. Mayor of New York*, 11 Paige, Ch. 427; *Hayden v. Stoughton*, 5 Pick. 528; *Castleton v. Langdon*, 19 Vt. 210; *Parsons v. Miller*, 15 Wend. 564.

This, however, was not a common purchase, but a grant by the sovereign power, and is analogous to a grant from the king. Such being the case, it is clear that the words employed in the habendum of the deed are the technical words, if any are necessary, to create a condition. 2 Co. Litt. 204 a, § 330.

The modern rule of interpretation, as applicable to all deeds, is to give effect to the whole and every part of the instrument, whether it be a will or deed, or any other contract. 2 Greenl. Cruise (2d ed.), 468 and notes; *Ib.* 586 *et seq.* and notes, *passim*.

The act of Assembly, also, being a legislative act, is to be construed according to the intention and power of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. *Wilkinson v. Leland*, 2 Pet. 662.

It was obligatory on the town of Providence to hold and occupy these premises for the purposes of a pest-house, or forfeit the estate. In the case of a grant by a private citizen, the rule is, that the deed shall be taken most strongly against the grantor;

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but in the case of a grant by the sovereign power, it is to be construed most strongly against the grantee, and nothing will pass by implication. 2 Greenl. Cruise (2d ed.), 912 *et seq.*, and the numerous cases cited in the notes.

The authority conferred by this act of Assembly was an exercise of the prerogative right of eminent domain. Then it follows that, as the purpose for which the land was conveyed has ceased, the plaintiffs are entitled to have these premises, as of the former estate of the persons, owners, through or under whom they claim. *Westbrook v. North*, 2 Greenl. 179; *Hampton v. Coffin*, 4 N. H. 517; *Harrington v. The Commissioners, &c.*, 22 Pick. 263; *People v. White*, 11 Barb. 26, and cases cited; *Bonaparte v. Camden, &c. R. R. Co.*, 1 Bald. 205.

The legislature has no right to take the property of one person without his consent, and transfer it to another, or authorize the same to be done, even for a full compensation, except by virtue of the right of eminent domain. Ang. on Highways, 55, and cases cited; 2 Kent's Com. 339, and cases cited; *Wilkinson v. Leland*, 2 Pet. 657.

Besides, it plainly appears from the act and deed themselves, that the purpose and object of the conveyance was of a public, and not a private nature; that the act and deed were made without the concurrence of the owners, *and that the public alone were to be benefited by the transaction.* No particular mode of exercising the right of eminent domain is necessary. It may be exercised by the government, through its immediate officers or agents, or indirectly, through the medium of corporate bodies or private individuals. *Pittsburg v. Scott*, 1 Barr, 314; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 251; *West River Bridge Co. v. Dix*, 6 How. 507; 2 Greenl. Cruise (2d ed.), 477, 563, 723.

T. A. Jenckes, for defendants.

To make a clause in an instrument of conveyance a condition, on the non-performance of which a forfeiture results, or in consequence of which the grantee holds only a base or determinable fee, certain clear and express terms are required. And this is equally true of limitations. Whether words amount to a condi-

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tion, or a limitation, or a covenant, may be a matter of construction depending upon the contract. Conditions and limitations are not readily to be raised by mere inference and argument. 4 Kent's Com. 123 *et seq.*; *Ib.* 132, note, and cases cited.

The words usually employed in creating a condition are, *upon condition*; and this, says Lord Coke, is the most appropriate expression; or the words may be *so that*; *provided*; *if it shall happen*, &c. The apt words of limitation are *while*; *as long as*; *until*; *during*, &c. The words *provided always* may, under the circumstances, be taken as a condition, or as a limitation, and sometimes as a covenant. 4 Kent's Com. 132; Co. Litt. 203 *a*, *b*; Bac. Abr. tit. Condition A and H; 1 Greenl. Cruise, 3.

The ancestor of the plaintiffs parted with the entire title. This estops any claim that there was a dedication by that ancestor. *City of Cincinnati v. White, Lessee*, 6 Pet. 431–438. And as to the principle on which dedication rests. *Beatty v. Kurtz*, 2 Pet. 566; *Barclay v. Howell*, 6 Pet. 498; *Irwin v. Dixon*, 9 How. 10; *Hills v. Miller*, 3 Paige, Ch. 254.

This conveyance must be construed according to the well-established rules of law. The intent of the parties, the circumstances attending the sale, the particular situation of the parties, the state of the country and the thing granted at the time, — are all to be considered. *Adams v. Frothingham*, 3 Mass. 852.

That construction of an instrument is to be favored which is most strongly against the grantor, particularly when the instrument may be capable of two constructions. *Cocheco Co. v. Whittier*, 10 N. H. 308; *City of Alton v. Illinois Trans. Co.*, 12 Ill. 38.

The intention of the parties, when clearly ascertained, is of controlling efficacy. That intention is to be collected from the words of the deed as expressive of and defining the meaning of the parties. The deed is to be construed most favorably to the grantee, if there is any doubt about the meaning of the parties. 4 Kent's Com. 132; *Howard v. Rogers*, 4 Har. & Johns. 281.

It is submitted that the words referred to can be properly construed in no other way than as words of description. That they

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were inserted not to operate as a condition, but for the special and express purpose of preventing any claim by the grantors or their heirs upon the town, for injury to the surrounding and adjoining estates by the nuisance which this pest-house might thereafter become.

CLIFFORD, J. To solve the matter in dispute, it becomes necessary to attend with some care to the language both of the act of Assembly and of the deed. Both parties concede that Martha Field was the duly constituted guardian of George and Mary Field, and it is not questioned by either that she petitioned for authority to sell a portion of the estate of her wards. By the preamble to the act of Assembly, it appears that she represented in her petition that a committee appointed by the town to procure a place to erect a small-pox house, for the use of the town, had made choice of a remote corner of the estate of her wards, and had applied to her to sell the same to the town. She also represented that the part applied for was barren, and of little consequence; and being desirous of accommodating the town, she prayed that she might be empowered to sell the same to the town for that purpose. After reciting these facts in the preamble, the act of Assembly, among other things, provides that the said Martha Field be, and she is hereby, authorized to make sale of the said two acres and a half of land for the said purpose; and that a deed thereof, made and executed pursuant to this act, shall vest in the purchaser all the right, title, and interest of the said Isaac Field in and to the same; and it also provides that the money arising therefrom be appropriated to the use of the said heirs, and that the sale be made under the direction of the town council of Providence, with the usual provision, requiring the guardian to account with the said council for the appropriation of the money. On the face of the act, it is apparent that the legislative Assembly intended to exercise the power of granting a license for the sale of that portion of the minors' real estate. That conclusion rests, not only upon the fact that the legislative act is based upon the petition of the administratrix of the estate and the guardian of the minors, but upon the express declaration that a deed made and executed in pursuance of the authority

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granted should vest in the purchaser all the interest which descended to the minors at the decease of their father. Most of the States have general laws making provision for the sale of estates of minors by their guardians, either for their support or education, or to pay their just debts, or for the purpose of changing the investment. Such laws generally require a license from some court of record; and the license is not usually granted, except on petition of the guardian, and after public notice to all interested. No one probably at this day would question the validity of such a general law to provide for the granting of licenses to authorize the sale of such estates, whether the authority was conferred upon a court of general jurisdiction, or a district or county court, or even upon the court of probate. Assuming that the legislature may confer such power upon the courts of a State, for the sale of a minor's real estate, and for the investment of the proceeds, it is difficult to see any reason why the legislature may not exercise the power directly by special act. Clearly, the character of the act in question is remedial, and in point of fact it has no other characteristic; and we think it cannot be distinguished in principle from a general law upon the same subject. Authority is given to sell the land and invest the proceeds, but a sale is not ordered or directed; nor is there a word in the act to control the legal discretion vested in the guardian. She was left to fix the terms of sale without restraint, and to sell or not, as she might thereafter determine to be best for the interest of her wards. But it is insisted by the plaintiffs, that the act in question is not one where the legislature attempted to exercise its tutelary power over the estates of minors or other persons incapable of disposing of the same. On the contrary, it is insisted that it was the exercise, on the part of the legislature, of the power of eminent domain. Looking at the whole act, however, there does not appear to be any foundation for the proposition; and sufficient has already been remarked, we think, to demonstrate its fallacy. Whatever is said respecting the use to which the land was to be applied by the town was mere inducement to the legislative Assembly to grant the prayer of the petition; and that remark applies with equal force to every one

of the phrases in the recitals of the preamble, on which the theory of the plaintiffs is based. Universal experience teaches that the tribunals intrusted with the ultimate power of granting licenses in cases of this description find it necessary, as it is their duty, to examine each particular application with scrutiny, and to exercise a careful supervision over the rights of those interested in the estate. Consequently the petitioner is required to assign solid reasons for the application, and oftentimes finds it prudent to introduce defensive allegations against the inference of interested motives. Allusion was accordingly made in this case to the promotion of the public health, to guard against any such suspicion, and to show that the petitioner did not originate the suggestion.

Another allegation in the petition is, that the land was barren, and of little consequence; and that representation was doubtless made, not only to show that the residue of the estate would not be injured by the sale, but also to show that a change of investment would be beneficial to the minors. Unconditional provision was made in the act that the money should be appropriated to the use of the heirs; and it was expressly provided that the sale should be made under the direction of the town council. At that period in the history of the State the town council, so called, exercised all the ordinary powers of a court of probate; and it was also provided, in effect, that the guardian should account to the town council for the proceeds of the sale. Without entering more into detail, suffice it to say, that we are of the opinion that, by the true construction of the act of Assembly, it must be understood as conferring a license upon Martha Field, guardian of George and Mary Field, to sell such portion of the real estate of her wards as was therein described, and to invest the proceeds of the sale for their benefit, under the direction of the town council of Providence; and she was not only authorized to sell the land, but to make and execute a sufficient deed to vest in the purchaser all the right, title, and interest in and to the same which descended to her wards from their father.

Having ascertained the true nature and extent of the authority conferred upon the guardian, it only remains to consider

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and determine in what manner that authority was exercised. As described in the deed, the parcel of land sold and conveyed contained two acres and thirty poles; and it was sold, as appears from the consideration recited in the deed, for the sum of one hundred and nine and three eighths Spanish milled dollars. Nothing, therefore, can be inferred in favor of the theory of the plaintiffs from any supposed inadequacy of consideration, as fifty dollars an acre, at that period of time, for barren land, situated in a remote corner of the town of Providence, may well be assumed as its fair value. Among other things, the deed shows that the conveyance was made to the town treasurer, or his successors in office, forever, in trust for the town; and in the granting clause it purports to be a full, free, and absolute conveyance of the land, without condition or limitation. But the introductory part of the instrument, preceding the granting clause, refers to the authority to sell and convey, as derived from the act of Assembly, and in that connection recites the purpose the town had in view in making the purchase. Considering, however, that the same recital was inserted in the act of Assembly, which, nevertheless, authorized an absolute conveyance of all the right, title, and interest of the minors in the premises, we are of the opinion that the words "for the purpose of erecting a pest-house upon" are merely descriptive of the use to which it was the intention of the town, at the time of the purchase, to apply the land, and that they were not inserted as a condition in the grant, or as a limitation or qualification to the estate conveyed. They would scarcely have that effect even if taken separately, but when considered in connection with the words of the granting clause it is quite obvious, we think, that the parties never intended to give them any such signification. When considered in connection with the other parts of the instrument, it is much more reasonable to suppose that they were inserted for the benefit of the purchaser. Undoubtedly it was the intention of the town to erect a small-pox house on the land purchased; and it may well be that the recital was inserted in the deed to foreclose all future complaint against such an appropriation of the premises. Be that as it may, it must, nevertheless, be assumed that if the

grantor had intended to create any such condition or limitation to the estate as is supposed by the plaintiffs, she would have employed, either in the granting clause or the habendum of the deed, some fit and proper language to signify such an intention. Nothing of the kind is pretended by the plaintiffs, so far as respects the granting clause, but reliance is placed upon the concluding phrase of the habendum, as tending to support that theory. As given in the instrument, the habendum reads as follows: "To have and to hold the said granted and bargained premises, with all the privileges and appurtenances thereto belonging or in any wise appertaining, . . . for the use aforesaid, forever." Conditions in a conveyance are either precedent or subsequent; and as there are no technical words to distinguish them, it follows that whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate. *Hotham v. The East India Co.*, 1 T. R. 645; *Finlay et al. v. King's Lessee*, 3 Pet. 374. Precedent conditions are such as must take place before the estate can vest, and must be literally performed. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated or forfeited. 4 Kent's Com. (9th ed.) 125. Most of the estates upon condition in law are of the latter kind, and are liable to be defeated upon breach of the condition, as on failure to pay rent, or the non-performance of other services annexed to the estate. Where a devise of lands was made to a town for a school-house, provided it should be built within a hundred rods of a given place, the proviso was held to be valid, as a condition subsequent, and that the estate was forfeited by a neglect to fulfil the condition for a period of twenty years. *Hayden v. Stoughton*, 5 Pick. 539. Unquestionably a breach of the condition authorizes the heir to enter; and if he make good his claim, he may hold the land, although it was vested for a time in the grantee or devisee. Shep. Touch. 450; 2 Bl. Com. by Shars. 155. Conditions subsequent, says Chancellor Kent, are not favored in law, and are to be construed strictly, because they tend to destroy estates; but whether so or not, it is clear that they are not to be implied, unless it appear from the language

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employed in the instrument that such was the intention of the parties. *Merrifield v. Cobleigh*, 4 Cush. 178; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. 440; *Doe v. Banks*, 4 B. & A. 401; Co. Litt. 205 *b*; 4 Kent's Com. (9th ed.) 146. Certain words and phrases, it is said, make an estate conditional, of themselves, without expressly giving the power of entry; and examples to that effect are given in several standard treatises upon the subject of conditional estates. Co. Litt. 203 *a* and *b*; Litt. Ten. by Toml. 374; 2 Greenl. Cruise, 3; 2 Bac. Abt. by Bouv. Tit. Condition, *a*, *h*, 280, 287. None of the words, however, put by the elementary writers as examples of what will create a condition in a deed of conveyance, are to be found in the deed in this case, nor any other which, properly understood, falls within the same category. Deeds, as well as other written instruments, ought in general to receive a liberal construction so as to uphold them, if possible, and carry into effect the intention of the parties. Effect ought to be given, if reasonably practicable, to every part of the instrument; and in order to accomplish that object, it is indispensably necessary to compare one part with another, and apply the whole to the subject-matter described in the instrument.

Applying these rules to the present case, it is quite obvious that the words of the habendum, "for the use aforesaid, forever," cannot possibly be construed as a condition in the grant, or as a limitation to the estate. Those words must be taken in connection with the words of the granting clause, which clearly show that it was the intention both of the grantor and grantee to convey an absolute unconditional estate; and they must also be weighed and interpreted in connection with what follows in the same instrument. Contrary to what is usual in conveyances of this description, the grantor not only covenants that she has good right and lawful authority to sell and convey the described parcel of land, but also covenants that the grantee shall quietly and peaceably enjoy the premises in manner aforesaid, and that she will forever warrant and defend the same against the lawful claims and demands of all persons. Comparing one part of the instrument with another, and the whole with the act of assembly

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authorizing the sale, not a doubt is entertained by the court that it was the intention of the grantor to convey to the town of Providence all the right, title, and interest which her wards acquired in the premises by descent at the decease of their father. Two theories are suggested as to the precise signification of the particular words under consideration, either of which appear to be more reasonable, and more in consonance with the general tenor and scope of the instrument, and consequently to be preferred to that suggested by the plaintiffs. One is, that they must be regarded as a substitute for the words "in trust for said town," which are contained in the granting clause of the instrument, and that they were inserted to exclude the conclusion that the conveyance was made for the individual benefit of the grantee named in the deed. Another is, that they were employed merely as descriptive of the purpose which the town had in view in making the purchase; but whether the one or the other, it is nevertheless obvious that they were not employed as creating a condition in the conveyance, or as a limitation to the estate. Such a construction would be a forced one, even if the words were separately considered; but when the phrase is compared with the other parts of the instrument, and the act of Assembly authorizing the sale, it is clear that it cannot be sustained. Neither the act of Assembly nor the deed afford any evidence that the town had agreed with the grantor to make the contemplated erection on the premises, or that she thought it of consequence to stipulate that the land should be appropriated to that use; and in the absence of any such stipulation or agreement, it can hardly be inferred that the adjacent proprietors are damaged by its discontinuance. For these reasons, we are of the opinion that the demurrer of the defendants to the plaintiffs' special replication must be sustained, and judgment must be entered accordingly.

United States v. Twenty-six Cases of Rubber Boots:

MASSACHUSETTS DISTRICT.

MAY TERM, 1860.

UNITED STATES, Plaintiff in Error, v. TWENTY-SIX CASES OF RUBBER BOOTS.

It is very doubtful if the sixty-sixth section of the act of March 2, 1799, ever had any application to a case of importation and entry made by the manufacturer and producer, as such.

By subsequent acts the basis of dutiable valuation has been changed from the actual cost to the actual market value or wholesale price.

Persons who have purchased the goods, and have the means of knowing the cost, are still required to make oath that their invoices contain a true and faithful account of the actual cost; but this is not now applicable to the manufacturer, who is not supposed to have the means of knowledge to enable him to do so.

By the act of March 1, 1828, provision is made for the importation of goods by the manufacturer, and the form of oath to be taken in such cases is there prescribed. It also makes discrimination between goods procured by purchase and such as are procured otherwise.

By this act the sixty-sixth section of the act of March 2, 1799, so far as relates to importations by the manufacturer, if it ever had any application to that case, is repealed.

WRIT of error to the District Court. The original suit was commenced February 24, 1857, and was an information framed on the sixty-sixth section of the act of March 2, 1799, filed by the district attorney, to enforce a forfeiture of twenty-six cases of rubber boots, imported from Canada into the United States at Rouse's Point, and there entered for warehousing and transportation to Boston. After being transported to Boston, they were seized on land by the collector of the port. The entry was made by and for certain persons under the name and style of Cheney, Fisk, & Co., and was duly signed on the 29th of January, 1857, at the office of the deputy collector, and an invoice of the goods was produced and left with the deputy collector. It was alleged that the goods included in the entry were invoiced at a less price than the actual price at the place of exportation. Certain issues of fact were tendered by the claimants in the first instance, but

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subsequently they presented a plea in bar of the information, which was filed by consent. The plea set up that the United States ought not to maintain the information, because the claimants were the manufacturers and producers of the goods, and that the goods were imported by them as such. To this the district attorney demurred, and the court overruled the demurrer.

C. L. Woodbury, United States district attorney.

Nowhere is the sixty-sixth section of the act of 1799 repealed in words. It is still in force. *Wood v. United States*, 16 Pet. 343 ; *Clifton v. United States*, 4 How. 250 ; *Buckly v. United States*, 4 How. 251 ; *United States v. Sixty-seven Packages*, 17 How. 92.

The suggestion of an implied repeal rests on the comparison of the words "actual cost" and "fair market value."

The "actual cost" in section sixty-six, act 1799, is not the original or prime payment. It says, "shall not be invoiced according to the actual cost thereof at the place of importation." Other things must be added afterwards, to make up the document required by the sixty-sixth section.

The purpose of the acts of 1818 and 1823 was to give further security for the *correctness* of the basis on which the levy of duty depended, namely, the invoice. Also to establish *equality* in the invoices produced by manufacturers and by purchasers, so that like duties should be paid by each.

The sixty-sixth section being still in force, and the invoice still required, can the act of 1823, § 4, be treated as repealing by implication or by inconsistency this clause *quoad* a manufacturer's invoice. 1st. It relates only to the oath on making the entry ; 2d. He must still enter by invoice ; 3d. The Supreme Court have declared all succeeding acts cumulative to this sixty-sixth section ; 4th. Were all oaths to entries repealed, the sixty-sixth section would be unaffected ; 5th. If the oath is at all directory or mandatory as to section sixty-six, it should be interpreted to mean, "that such an invoice so sworn should be taken and deemed a sufficient compliance with the sixty-sixth section, provided no fraudulent intent appears." If this is not so, then he is not relieved from the sixty-sixth section.

In 1818, the words "true value" were used as a basis for duties ;

they were held to mean "actual cost." *United States v. Tappan*, 11 Wheat. 419.

The object of the oath of 1823 is not within the sixty-sixth section ; these proceedings relate to the invoice, and are independent of the fact whether an oath is taken or not.

The object of the two acts does not relate to the same thing, and there is no necessary repugnancy between them.

From these sections it is apparent that two terms of value are used, — "actual cost" and "fair market value," — and that the invoice of goods entered by the manufacturer must contain the "fair market value," and that he must make solemn oath that it does.

It is held in the *United States v. Sixteen Packages*, 2 Mas. 53, that the phrase "actual cost," as used in the sixty-sixth section of the act of 1799, refers and is only applicable to cases where the goods have been acquired by purchase in a *bona fide* transaction between buyer and seller, and means the actual price paid. See also *Alfonso v. The United States*, 2 Story, 431.

In *Belcher v. Lawrason*, 21 How. 254, the court recognizes the distinction between the purchaser's and the manufacturer's oath.

M. Andros, for claimants.

The thirty-sixth and sixty-sixth sections employ three terms expressive of value, — "actual cost," "prime cost," and "real cost," — and "they are all phrases of equivalent import, and mean the true and real price paid for the goods upon a genuine *bona fide* purchase." *United States v. Sixteen Packages*, 2 Mas. 53.

Thus the law remained for nearly twenty years, or until the act of April 20, 1818. 3 Stat. at Large, 433. The fifth section of this act required *inter alia* that the owner, &c., should, in addition to the oath now required by law, — that is, in addition to the oath provided for in the thirty-sixth section of the act of 1799, — declare on oath that the invoice produced exhibits the *true value* of the goods, &c., in their actual state of manufacture at the place from which the same were imported.

The eighth section provided that the owner should declare whether he was the manufacturer or not, and if he was, then that he should make oath that the prices charged in the invoice

were the *current value* of the same at the place of manufacture, and such as he would have received if the same had been sold in the usual course of trade.

Congress drew a distinction between the oaths to be taken by the manufacturing and the purchasing importer.

That there is a positive repugnancy between the provisions of the act of 1823 and the sixty-sixth section of the act of 1799, so that the two cannot as to the present case coexist. *Wood v. United States*, 16 Pet. 362.

To the point of repeal by implication.

The fourth section of the act of 1823 provides three forms of oaths, one of which is to be administered according as the person making the entry shall be the consignee, importer, agent, owner, or manufacturer. And this oath it is expressly stated is "in lieu of the oath now prescribed by law," that is, in lieu of the oath prescribed by the acts of 1799 and of 1818.

The fifth section provides that the duties shall be assessed upon their *actual cost* if the goods shall have been actually purchased, and upon their *actual value* if the goods have been procured otherwise than by purchase. *Alfonso v. The United States*, 2 Story, 430.

CLIFFORD, J. Passing over any mere formal objections to the plea in bar, the record presents but two questions for the consideration of the court. It is insisted by the counsel for the claimants that the sixty-sixth section of the act of the 2d of March, 1799, is inapplicable to the facts of this case, as set forth in the plea in bar, and if applicable, that the section is repealed by the fourth section of the act of the 1st of March, 1823. That proposition, which is twofold in its character, is wholly denied by the district attorney, and he insists that the provision in question is in full force, and that it is applicable to importations made by the manufacturer or producer, as well as to those made by the owner where the goods have been actually purchased. No other questions were discussed at the bar, and the inference is a clear one, both from the state of the record and the course of the argument, that the counsel on both sides desire that the decision of the court may turn upon the solution of those questions. Under

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the circumstances, mere formal defects in the plea, if any, will not be noticed in determining the cause. Regarding the case as one of considerable importance, I think it proper to say in the outset that the questions presented for decision are not unattended with difficulty and perhaps are involved in some doubt.

It is provided by the sixty-sixth section of the act of the 2d of March, 1799, that if any goods, wares, or merchandise, of which entry shall have been made in the office of the collector, shall not be invoiced according to the actual cost thereof at the place of exportation with the design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited. 1 Stat. at Large, 677. Whether that clause of the section is repealed or not, so far as respects importations acquired by purchase in the foreign market, is a question which has been twice before the Supreme Court; but after a careful examination of the respective opinions given by the court in those cases, in connection with the facts on which the decisions were based, I am of the opinion that the Supreme Court has not decided the questions involved in this record. *Wood v. The United States*, 16 Pet. 357; *United States v. Sixty-seven Packages of Dry Goods*, 17 How. 93. Referring to the case first cited, it will be seen that the only count considered by the court was framed upon the same section as the information in this case; but all the importations, as well as the entries at the custom-house, were made by the purchaser of the goods, and not by the manufacturer or producer. Forfeiture takes place, say the court, in the second case, if the goods described in the invoice are set out under the cost value, with the design stated in the act of Congress; and the court add that the object of the act is to prevent frauds upon the revenue in passing goods through the custom-house by means of this device at an undervaluation. Importation and entry, however, in that case, as well as in the former, were made by the purchaser who had the means of presenting the true and genuine invoice. Those cases decide undoubtedly that the provision in question is in full force and unrepealed in all cases where the importation and entry are

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made by the purchaser, but they do not touch the questions involved in this record. On the contrary, it still remains to be considered whether the provision under consideration ever had any application to a case where the importation and entry were made by the manufacturer or producer, and if so, whether it has not in that respect been repealed. Entry of goods imported by any owner or consignee is required by the thirty-sixth section of the before-mentioned act to be made in writing, with the collector, by such owner or consignee, or in his absence by his agent or factor, within fifteen days after the master's report of the arrival of the vessel. Such entry is required to specify the vessel, the name of the master, the port or place from whence the goods were imported, the particular marks, number, denomination, and prime cost of the goods; and the owner or consignee is also required to produce the original invoice of the same, or other documents received in lieu thereof, or concerning the same in the same state in which they were received, together with the bill of lading. In addition to the foregoing requirements, and some others which need not be noticed, the same section prescribes a form of entry, and provides that the same shall, "as the nature of the case will admit or require, be agreeably to that form," but it also provides that the form shall and may be varied and adapted to any alterations that may be made in the rates of duties. Looking at the language of the section, it is obvious that the form of entry prescribed is not obligatory where, from the nature of the case, it would not speak the truth, and it is expressly provided that it shall be varied whenever alterations are made in the rates of duties on imports. Every such entry made by any importer, consignee, or agent is required to be verified by the oath or affirmation of the person making the same, and the same section also prescribes the form of the oath. According to that form, the importer, consignee, or agent is required to certify, among other things, that the entry contains a just and true account of the goods, and a just and true account of the cost thereof, including charges, and also that the invoice and bill of lading produced are the true, genuine, and only invoice and bill of lading received of the goods, and that both are in the actual state in which they

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were received. Where the particulars of the goods, however, are unknown, a very different entry and oath are prescribed by the last proviso of the same section. Authority is given to the importer, consignee, or agent in such cases, to make an entry of the goods, which is described therein as one in lieu of the entry before mentioned, and the clause provides that it shall be made and received *according to the circumstances of the case*, the party making the same declaring upon oath all he knows or believes concerning the qualities and particulars of the goods. 1 Stat. at Large, 655, 658. *Ad valorem* rates of duty upon goods at the place of importation were required by the sixty-first section of the act to be estimated by adding a certain percentage to the entire cost thereof, including outside packages, and all charges and commissions except insurance. Further regulations for the collection of duties on imports were made by the act of the 20th of April, 1818, and by the fifth section of the act every owner, consignee, agent, or importer is required, in addition to the oath previously prescribed by law, to declare on oath that the invoice produced exhibits the true value of the goods in their actual state of manufacture at the place from which the same were imported. Regulations for ascertaining whether or not the owner was the manufacturer of the goods imported was first made by the eighth section of the last-named act, which provides that non-resident owners shall further declare on oath whether they were the manufacturers in whole or in part of the importation, or were concerned directly or indirectly in the profits of any art or trade by which the goods had been brought to their present state of manufacture, and if so, they are required to make further oath that the prices charged in the invoice are the current value of the same at the place of manufacture, and such as they would have received if the same had been sold in the usual course of trade. 3 Stat. at Large, 435. New and still more important provisions for the collection of duties on imports were made by the act of the 1st of March, 1823, which is the act relied on by the claimants as repealing the provision on which the information in this case is founded. 3 Stat. at Large, 329. True invoice of importations is required, by the first section of

that act, to be presented to the collector at the time of the entry, and unless that be done the same section provides in effect that the goods, if subject to *ad valorem* duty, shall not be admitted to entry, unless the same be admitted in the mode authorized and prescribed in the second section, which has no application to this case. Wrecked goods are saved from the prohibition by a proviso to the first section, and by the twenty-first section goods damaged in the course of the voyage are placed upon the same footing. Collectors are required by the fourth section of the act, in all cases where the goods are imported and entered *by invoice*, to administer according to the nature of the case one of three oaths therein prescribed to the owner, consignee, or agent, "in lieu of the oath now prescribed by law in such case." Of these, the first form is prescribed for the consignee, importer, or agent, and the second for the owner in cases where the goods have been actually purchased.

1. When the entry is by a consignee, importer, or agent, he or they are required to make oath, among other things, that the invoice and bill of lading are the true and only invoice and bill of lading received of all the goods, for account of any person for whom he or they are authorized to enter the same, and that those documents are in the state in which they were received; that the entry contains a just and true account of the goods according to the invoice and bill of lading; and that, to the best of his or their knowledge and belief, the person therein named as such is the owner of the same, and that the invoice produced exhibits the actual cost of the goods if purchased, or the fair market value of the same if otherwise obtained, at the time and place when and where procured.

2. Where the goods have been actually purchased, and the owner makes the entry, he is required in all cases to make oath that the entry contains a just and true account of all the goods, and that the invoice produced contains a just and faithful account of the actual cost of the same, and of all charges thereon which are particularly specified in the form of the oath. Both of the preceding oaths, it will be seen, have respect to the nature of the case, and were evidently framed so as to avoid any

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necessity for false swearing, but at the same time to elicit all the material facts within the knowledge of the affiants.

3. Those remarks indeed apply to all the previous legislation upon the subject, and the intention of Congress in that behalf is equally well exemplified in the third form prescribed in the same section. That form of oath applies when the entry is made by the manufacturer or by the owner, in cases where the goods have been procured otherwise than by actual purchase. Such parties are required to make oath that the entry contains a just and true account of the goods imported, and that the same were not actually bought by the person making the entry or his agent in the ordinary mode of bargain and sale, but that, nevertheless, the invoice produced contains a just and faithful account of the same at their *fair market value*, including charges. Unmistakable discrimination is also made in the fifth section of the act between goods actually purchased and such as are procured otherwise than by purchase, in the mode there prescribed for estimating *ad valorem* duties. Actual cost, actual value, and appraised value are severally recognized as a basis of the calculation. Duties were levied upon the invoice and entry in the preceding acts, and that is true of the act under consideration, except when the collector is of the opinion that there is just ground to suspect that the goods are invoiced below their true value in the place from whence imported, and in that event the collector is required, by the thirteenth section of the act, to direct the same to be appraised, and if the appraised value exceeds by twenty-five per cent the invoice prices, then, in addition to the per centum laid upon correct and regular invoices, under the fifth section of the act, he is required to add fifty per centum on the appraised value. Unless appraised, therefore, goods actually purchased were valued at the actual cost, as specified in the invoice, and goods procured otherwise than by purchase were estimated, subject to the same qualification, at the actual or fair market value, as specified in the same document; but if either class was directed to be appraised under the thirteenth section of the act, then the goods were estimated at the appraised value. These explana-

tions are sufficient to show the correctness of the remark, that actual cost, actual or fair market value, and appraised value are severally, according to the nature of the case, recognized by that act as a basis of dutiable valuation.

Additional regulations upon the subject were made by the act of the 28th of May, 1830 ; and by the seventh section of the act of the 14th of July, 1832, it is made the duty of the collector, in all cases where an *ad valorem* rate of duty is imposed on any goods, to cause the actual value thereof at the time purchased, and place from which imported, to be appraised, estimated, and ascertained ; and it is made the duty of the appraisers, by all the reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual value of such goods, any invoice or affidavit to the contrary, notwithstanding. 4 Stat. at Large, 409, 591. All duties were required to be paid in cash, by the twelfth section of the act of the 30th of August, 1842 ; and in all cases where any *ad valorem* rate of duty was imposed, it is made the duty of the collector, by the sixteenth section of the act, to cause the actual market value or wholesale price of the goods, at the time when purchased, in the principal markets of the country from whence imported, to be appraised, estimated, and ascertained. 5 Stat. at Large, 563. Cost and charges are to be added to such value or price ; and in that mode the collector is directed to estimate the dutiable value of the importation “ as the true value at the port where the same may be entered, upon which the duties shall be assessed.” Where the cost or value given in the invoice is too low, the owner, consignee, or agent is allowed, by the eighth section of the act of the 30th of July, 1846, to make such addition thereto in the entry as will raise the same to the true market value of such imports. By that act also *ad valorem* duties are required to be assessed upon the true market value of the imports in the principal markets of the country whence the importation shall have been made ; and it is made the duty of the collector to cause the dutiable value of such imports to be appraised, estimated, and ascertained in accordance with the provisions of existing laws. 9 Stat. at Large, 43. Actual market value or wholesale price is also the

rule in all cases; under the appraisement act of the 3d of March, 1851; and the first section of the act provides that to such value or price shall be added all costs and charges, except insurance, as the true value at the port where the same may be entered, upon which the duties shall be assessed. 9 Stat. at Large, 629. Such value or price must still be ascertained by appraisement; but the third section of the last-named act provides that the appraisement shall be final and conclusive, and deemed and taken to be the true value of the goods; and the duties shall be levied thereon accordingly. Clearly, therefore, the duties are now calculated from the report of the appraisers, and not from the invoice and entry, as was the case under several of the earlier acts of Congress. But the entry, if practicable, must still be accompanied by the invoice and bill of lading; and no doubt is entertained that in all cases where the goods are actually purchased, and the entry is made by the owner, or any other person having knowledge of the fact, it is incumbent on him to make oath that the invoice contains a true and faithful account of the actual cost of the goods. Appraisers, it is true, are required to ascertain, estimate, and appraise the true market value, or wholesale price; but it is obvious that any evidence showing what was the actual cost of the importation would greatly facilitate that inquiry; and in practice the invoice produced of the actual cost of the goods furnishes the principal guide for the appraisers in the performance of their duty. Purchasers know what the actual cost was, and therefore are required to state that fact in the invoice; and the fact is scarcely less important under the present rules of appraisement than it was when the duties were levied on the invoice. Manufacturers or the producers of the goods do not know the actual cost of the articles, as in the case of the purchaser; and consequently a different form of oath is prescribed, corresponding in its requirements with the nature of the case. It is insisted by the district attorney, however, that actual cost and true market value mean the same thing. Three terms, to wit, "actual cost," "prime cost," and "real cost" are employed in the first-named act, as expressive of value; and the term used in the fifteenth section of the act of the 20th of April, 1818, is the

“true value” of the goods in their actual state of manufacture. Shortly after the passage of the last-named act, a case arose in which it was contended that the provision last referred to changed the basis of valuation established in the first-named act, and introduced a new one equivalent to the actual market value of the importation. But Judge Story held otherwise, admitting, however, at the same time, that if the words had been “market value,” instead of “true value,” as they were, he would have been of a different opinion. *Tappan v. The United States*, 2 Mas. 308. “Fair market value” is the term employed in the act of the 1st of March, 1823; and subsequently to its passage the question was again presented to the Circuit Court for this district. On this last occasion, the same learned judge held that the phrase “actual cost,” in the first-named revenue act, means the actual price paid in a *bona fide* purchase, and not the market value, and added, that he was very much inclined to hold the opinion that the provision on which this information is founded, so far as it inflicts a penalty, did not apply, except to cases where an actual purchase had been made, and of course where the invoice ought to be of the actual cost upon such purchase. *Alfonso v. The United States*, 2 Story, 431. Prior to that decision, the same point, substantially, had been ruled by the Supreme Court, in *Tappan v. The United States*, 11 Wheat. 423; and it is worthy of remark that Mr. Justice Thompson, in the course of the opinion given in that case, admits that there is a distinction between actual cost and current market value. Strong doubts are entertained whether the provision in question ever had any application to a case like the present, as exhibited in the plea in bar; but it is not necessary to place the decision entirely upon that ground, because it is clear and unmistakable that the basis of dutiable valuation has been changed from the actual cost to the actual market value or wholesale price. Persons presenting invoices, who have purchased the goods, or have the means of knowing the actual cost of the articles in the foreign market, are still obliged to make oath that it contains a true and faithful account of the actual cost; but that requirement is not now applicable to the manufacturer or producer, because they are not supposed to have the means of

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knowledge to enable them to comply with its terms. It is admitted by the demurrer that the claimants in this case were the manufacturers and owners of the importation, and that as such manufacturers and owners they imported the goods; and consequently I am of the opinion that the judgment of the District Court must be affirmed.

MAINE DISTRICT.

APRIL TERM, 1861.

JAMES B. CAHOON *et al.* v. AARON RING.

Letters-patent offered in evidence by the respondent, in the trial of feigned issues, for the purpose of showing want of originality in the complainants' invention, must be construed by the court; and if it appears that the patent so offered in evidence has no tendency to support the issue, it should be rejected as immaterial evidence.

Depositions taken *de bene esse*, and without notice to the opposite party, in suits at common law, are not admissible in the trial of feigned issues out of equity, unless the same were sent down with the record of the issues framed on the equity side of the court.

After the decree ordering feigned issues has been entered, and the record of the same has been sent to the law court for the trial of the issues, the latter court will not order that any depositions previously taken on the equity side, and not sent down with the record, shall be withdrawn from the files of the equity court, or that they may be admitted as evidence on such trial in the law court.

Where the feigned issues presented no issue of fraud or mistake, and the bill of complaint was founded exclusively upon the reissued letters-patent, it was held that the original letters-patent, if objected to, were not admissible on the trial of such issues.

Office copies of the complainants' correspondence with the Commissioner of Patents pending the application for the reissue of the patent were also excluded as not pertinent to the question of novelty, or of construction.

Patents offered in evidence in the trial of feigned issues, and properly rejected as having no tendency to support any one of the issues, cannot be rendered admissible by any extraneous evidence. Such evidence, if from experts, may in certain cases be received in aid of the construction of the patent, but the rule still is, that the patent is not admissible, if it has no tendency to support the issue.

Although the respondent is a competent witness in the trial of feigned issues, still he cannot be asked any question by the defence calling for testimony which contradicts his answer.

Evidence of new experiments upon the machines in question, on the trial of feigned issues, in a patent suit, cannot be offered by the complainant in his rebutting testimony.

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It is the duty of the court to construe the plaintiff's patent, as a matter of law, and to instruct the jury in what his invention consists.

In order to invalidate the patent of the complainant, the respondent must show that some one, prior to complainant's invention, had invented a machine for the same purpose, containing the several improvements which the complainant claims, or some of them; but the complainant's patent is valid for such of the several improvements claimed as are not thus shown to have been first invented by another.

Complainant being the alleged inventor of a machine for discharging seed broadcast, in vertical planes, perpendicular, or nearly so, to the line of travel of the machine, and by means of centrifugal force, *held*, that in order to invalidate the complainant's patent by machines or models introduced at the trial, they must be shown to be machines operating like the complainant's, by means of an apparatus constructed, arranged, and operating substantially in the same way.

A prior machine for discharging seed in horizontal planes, although, by certain modifications of its construction and arrangement, it could be adapted to discharge seed in vertical planes, does not necessarily embody the principles and mode of operation of the complainant's invention, if he be found to be the first to invent and adapt an apparatus for sowing seed in vertical planes.

Such prior machine would not anticipate that of the complainant if it required invention to make the necessary modifications in the construction and arrangement.

Models made and used merely as experiments, and which were not capable of being used for agricultural purposes, cannot affect the complainant's patent, although it appears they were made prior to his invention, and were capable of being operated for the purpose of such experiments.

Held, also, that machines previously constructed, but never made public, and used only as private experiments, and then broken up, and the essential materials appropriated for other purposes and ultimately lost or abandoned, could be no obstacle to the right of the complainant to take out a patent, if he had no knowledge of such prior invention.

Difference in size and proportion of devices or machines, so long as the construction, principles, and mode of operation are the same, is entirely immaterial.

In order to determine a question of infringement between two machines, the jury are to look at the machines and compare the same, or their devices, in the light of what they do, or what office or function they perform, and how they perform it.

Inquiry must be directed more particularly to those portions of a given part which really do the work, in preference to other portions of the same part which are only used as convenient methods of constructing the whole part.

If two machines do the same work, by substantially the same means, in substantially the same way, and accomplish substantially the same result, they are the same.

Feigned issues out of equity having been ordered before the time for taking testimony had expired, the court sitting in equity refused to enter a final decree for the complainant, upon the verdict of the jury, which was in his favor, but gave the parties further time to take testimony under the equity rule.

THIS was a bill in equity founded upon letters-patent granted to Charles W. Cahoon, September 1, 1857, for an improved seeding-machine. On the 26th of the same month the inventor assigned to James B. Cahoon the entire interest. James B. Cahoon subsequently assigned one half of the patent to Dependence H. Furbish. The patent was reissued to the com-

plainants May 11, 1858. The claims of the reissued patent were in these terms : —

“First. The employment of a tubular chamber or discharger, rotating rapidly in a horizontal position, so that its outer edge or periphery will be in a plane vertical or nearly so to the horizon, and thereby communicating a centrifugal motion to the grain, &c., away from the centre of a circle whose plane is thus vertical or nearly so, to the horizon.

“Second. The employment of a funnel-shaped discharging chamber, for the purpose and rotating in the position above described, having spiral flanches or their equivalents inserted therein, and operating to arrest the too direct flow of the grain, &c., through the discharger, and retaining it therein, until the necessary centrifugal force is imparted to it, before it leaves the discharger.

“Third. The combination and use of the above-described tubular or funnel-shaped discharging chamber, rotating in the position above described, with the disk H placed and operating in the manner described.

“Fourth. The combination and use of the above-described and above-claimed tubular or funnel-shaped discharging chamber, rotating in the position above described, whether with or without the use of the disk H, with a hopper constructed of any proper material and fitted with the slide (*b*) and rock-shaft (*c*) with teeth (*d*) attached, or their equivalents, and operating substantially in the manner above described, to feed the grain, &c., into the discharging chamber.”

The bill charged that defendants' machine infringed the patent of Cahoon, and prayed for an injunction. The answer denied that Cahoon was the original inventor of his alleged improvements ; set up letters-patent granted to defendant March 2, 1858 ; denied that defendant had ever made any machines infringing Cahoon's patent, but admitted that defendant had made and sold a few machines constructed in accordance with his patent. After replication filed, and at request of the parties, a decree was entered that certain feigned issues of fact be tried by the jury, viz. : —

1. Whether the said Charles W. Cahoon, at the date of his original application, was the original and first inventor of the improvements, or any, and which of them, described and claimed in the specification of complainants' reissued letters-patent.

2. Whether respondent, without the license of the complainants, had, since the date of the reissued letters-patent, made, used, or sold any machines infringing those claims, or any, and which of them, as embraced in the said specifications.

Trial was accordingly had, at which several questions regarding the admission of testimony arose, upon which rulings were made by the court. These it seems necessary to notice, in order to a full understanding of the case. The first question of importance arose upon an offer, by the defence of the patent of one William Bullock, dated August 1, 1854. This was objected to by complainants on the ground that it was not a machine which discharged seed broadcast, and in planes vertical, or nearly so, to the horizon, which was the character of Cahoon's invention, but was a machine for dropping corn off a cylinder. It was further contended that the court must first construe the patent offered in evidence to see if it had any tendency to invalidate complainants' patent. If introduced to show the state of the art, no objection to its admission was made. Upon this offer the court ruled that evidence offered "must be construed by the court, and if, by its true construction, it had a tendency to support the issue for which it was offered, it was admissible, but if it had no such tendency, then it must be excluded." The court further said : —

CLIFFORD, J. We cannot see that there can be any other rule. Assuming the one first stated by the counsel for the defence to be correct, that is, that they have a right to put into the case whatever papers they please, the effect would be to embarrass the court, confuse the jury, and, in a word, accomplish no possible good for either party. But there must be some rule, and assuming that none has been established, and that we are now called upon to prescribe the rule, what would be the most convenient one, and the one best calculated to subserve the ends of justice. We see none save the one in-

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licated, and that is, that if, upon the true legal construction of the paper, it has a tendency to support the issue, then it is admissible; on the other hand, if it has no such tendency, then it is inadmissible. Accordingly, we have examined this patent, and we are not able to see that, upon any construction that could be adopted, it can have any possible tendency to support the issue maintained by the defence, no more than a patent, if such there be, of the old-fashioned grist-mill would have. Such a mill had a hopper, and I think a stirrer, and perhaps a slide, but no one would think of offering a patent of that description as having a tendency to support this issue, simply because one of its elements or devices was a hopper. This patent contemplates a machine for sowing in drills or planting in hills; and in no possible view that we can take of it can we see that it has the remotest tendency to serve the purpose for which it is offered. We therefore exclude it.

The next question arose upon an offer of the deposition of one S. S. Hogle. The admission of this testimony was resisted upon the ground of its being *ex parte*, taken *de bene esse*, and because no notice of its being taken had been given to the opposite side; and also because it was offered to be read on the trial of an issue before a jury on the law side of the court, ordered out of equity. *Patapsco Insurance Company v. Southgate*, 5 Pet. 604, and the sixth, seventh, sixty-eighth, and sixty-ninth rules in equity, were cited; and 1 Barb. Ch. Prac. 452. Upon this the following ruling was given:—

CLIFFORD, J. If this was a matter over which this court had any discretion, there might be a different ruling. But it is a question of law, and the court must rule upon the law. Our practice is based upon the English practice. By one of the rules of the court it is expressly provided that, where there is a want of provision in the laws of Congress and the rules of the court, the practice in the High Court of Chancery in England shall prevail. [Rule 90.] In that country issues are framed in chancery, and sent to the law tribunal to be tried. And, by a well-known practice of the court, the depositions taken in chancery cannot be used in the trial at law, except such as are

ordered to be used by the court from which the issues go. So that if depositions were on file in this case on the chancery side, we do not see how it would be possible for this court to allow them to be used on the trial of these issues, inasmuch as the parties omitted to have the necessary order passed in the cause at the time the record was made up. It is true less reason exists for that strictness in our practice than in England, where the two trials take place in different tribunals. But inasmuch as the Supreme Court have adopted the rule that, in all cases not provided for by the statute, nor by the rules of the court, the English practice shall prevail, we do not well see how the court can admit this deposition. We must see what condition the case would be in if it should be appealed to the Supreme Court. When thus appealed, there would be found in the record no order for the use of depositions taken upon the equity side, and of course the error in allowing them to be used would be patent upon the record; it would be a violation of the rules of the court, and would necessarily vitiate the verdict. It may be said that this deposition is not offered upon that ground, but upon the ground that it has since been taken to be used upon the law side. But upon looking at the caption, it appears that it is expressly stated that it was taken upon the equity side.

Subsequently the court was requested to make an order that testimony taken upon the equity side of the court might be used at the trial of the issues at law in the case. This request was refused, inasmuch as the record upon the equity side was made up, and the case was at that time in the law court.

Offer in evidence of the patent of one C. O. Luce and others, and the original rejected application of S. S. Hogle, were made and ruled out upon the same ground as the patent of Bullock. The original patent of Cahoon was then tendered as evidence to show what the invention of the patentee was at the date of said patent. Upon this it was held that "it could not be received upon the issues pending before the jury, no issue of fraud having been framed, but merely the two issues of novelty and infringement." The court also ruled that the office copies of the correspondence in relation to the granting of the reissued patent to Charles W.

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Cahoon, were also inadmissible. The several patents whose admissibility had been denied' by the court were next offered in connection with the testimony of experts afterwards to be introduced. This was rejected, because the court could have no opportunity to ascertain, before admitting the patents with such explanatory testimony, whether or not such testimony laid a foundation for the admission of the patents.

A question was proposed to the respondent on the stand, "if he made and sold any of his machines since the date of the reissued letters-patent to Cahoon." This was objected to as contradicting his answer, in which the respondent alleged that he "had made and sold a few of his machines for seeding, constructed in accordance with his patent." The opinion of the court in announcing the ruling is given below: —

CLIFFORD, J. There are one or two principles of law to be considered in construing the pleadings in this case: the first one, the primary one, is, that the bill and answer must be construed together; the second one is, that it is incumbent upon the respondent in every particular to answer directly and precisely to every material allegation in the bill. Particular and precise charges must be answered particularly and precisely, and not generally. *Woods v. Morrill et als.*, 1 Johns. 103. That is an elementary principle.

Another principle of still more importance, which also is itself an elementary one long since established, is that whatever in the bill in itself material, is omitted and passed over without answer, provided it is well pleaded, is thereby conclusively admitted. Mr. Greenleaf, in his treatise on the Law of Evidence, twice treats of that principle. In his first volume, § 27, he says: "If a material averment well pleaded is passed over by the adverse party without denial, . . . it is thereby conclusively admitted." He is there speaking of pleadings both at law and in equity. But he treats the question more specifically in his third volume, and more directly upon the question immediately under consideration. In section two hundred and seventy-six he says: "The bill alone may sometimes be read by the plaintiff as evidence against the defendant of his admission

of the truth of the matters therein alleged, and not noticed in his answer. The principle governing this class of cases is this, that the defendant, being solemnly required to admit or deny the truth of the allegations, has by his silence admitted it, *Qui tacit cum loqui debet consentire videtur*. But this applies only to facts either particularly charged to be within the knowledge of the defendant, or which may fairly be presumed to be so." It does not apply to facts charged on information and belief to be within the knowledge of the defendant, nor does it relate to facts respecting which it is not charged, or from the nature of the subject-matter to be implied, that they are within his knowledge.

It will at once be perceived that the matters charged here are necessarily within the knowledge of the defendant, for the charge is that he made the machines. The same principle is also quite as well stated in 2 Dan. Ch. Prac. 977, particularly in a note in these words: "Where the bill charges the fact to be within the knowledge of the defendant, or which may fairly be presumed to be so, if the defendant is silent as to the fact, it will be determined as admitted." To this note are appended various authorities which need not be read, as they are accessible by reference to the volume. In the case of *Surget v. Byers*, 1 Hemp. 719, it is thus stated by Mr. Justice Daniel of the Supreme Court:—

"It is a rule of pleading in the courts of common law that every material averment which is not denied will be regarded as admitted.

"This rule would seem to apply *a fortiori* before a tribunal which discourages all exceptions of a formal character. The respondent had the power either by demurrer or plea, or by direct denial in his answer, to object to the structure of the bill, or to the competency of the parts or members thereof; and surely it was his duty to warn the complainant, to enable him to meet such exception, if designed to be insisted upon."

We think it is a settled rule in pleading in chancery that in respect to an allegation well pleaded, and material to the issue, and one where it is charged that the facts set forth were within the knowledge of the defendant, that his silence upon the subject amounts to a conclusive admission.

Starting, then, with this principle, we should at once reach the conclusion that if no answer had been made to this allegation in the bill, the admission would have been conclusive. And that raises two questions: first, is the fact well pleaded in the bill? and, secondly, if well pleaded in the bill, is the case discriminated out of the principle laid down in the books on account of anything contained in the answer? First, is the matter well pleaded in the bill? The bill alleges that since the time of the reissue of the letters-patent, the respondent has, without license, &c., "made, used, and sold large quantities of machines substantially and in principle embracing in the construction and mode of operation the feature or part of the invention before described." It is not perceived how language could allow of anything more specific either in respect to the matter of fact charged or the time when it is alleged that the machines were made.

In effect the allegation is that they were made since the date of the reissue of the patent, and of course it embraces all the time to the filing of the bill. It would have been no more explicit if it had contained the allegation, since the 11th of May, 1858, to the time of filing the bill. The form of the charge, therefore, as contained in the bill, is explicit, and it charges a fact within the knowledge of the defendant.

Now is there anything in the answer in relation to this allegation to take it out of the operation of the principle already stated? On one point there undoubtedly is. He says "he has made a few machines for seeding in strict accordance with the description contained in his specifications." He does not admit that he made one of the plaintiff's machines, but he does admit that he made a few of his own, in language as explicit as could well be chosen.

He says nothing as to the time, although he is answering the specific charge in the bill that it was done within a prescribed time. But in respect to time his answer is silent. And the rule of law, therefore, applies with all its force; that being called upon specifically to state a fact, he passes it over in silence, thereby conclusively admitting it.

In their rebutting testimony, the plaintiffs endeavored to intro

duce certain experiments of experts upon the Cahoon machine, and one called the Hogle machine, in order to prove that the Hogle machine was, of necessity, continuous in its discharge, while the Cahoon machine was not. This was objected to by the defence, as introducing a new set of experiments, after the plaintiff had rested his case. Upon this the court ruled as follows:—

CLIFFORD, J. Before stating that conclusion, we will remind the counsel of the posture of the case, which must be taken into account in order to see the exact and precise application of the rule. This is a trial at law, although it had its origin in a proceeding in equity. In a trial at law, the defendant is required to give notice, a general notice, of the nature of the evidence that he proposes to offer in order to invalidate a patent, as in this case. It is reasonable, therefore, to conclude that, so far as respects that notice, it embraced the Hogle machine, as one of the matters to be relied upon to invalidate the patent of the plaintiff in this case. When the plaintiff opened his case, he had some general knowledge, arising from that notification, of the character of the defence which he had to meet. He accordingly introduced various specimens of his machine, for the purpose of reference and explanation during the trial. At that stage of the case the defendant could not introduce any. When the defence was opened, it became the right of the defendant to introduce such models as he thought would serve to illustrate his own machine, and also such forms of the plaintiff's machine, if any there were, varying in construction from those which had been introduced by the plaintiff himself. On these two showings, so far as machines are concerned, the case has proceeded, and is proceeding. The plaintiff now desires to put into the hands of his witness certain modification of some one of the various models of his machine; and if he merely offered this as a diagram, as a chalk, there would be much less difficulty in allowing it. But if admitted for that purpose, and limited there, it would not enable the plaintiff to put into the case what he desires in connection with it. Experiments made as a chalk or with a separate and independent device are not admissible. They must be made with a machine; and when a modification is offered it affords ground

for the other side to allege that it is a different machine ; and the effect of allowing it to come in would be, of necessity, to allow the defendant — after the plaintiff concludes his rebutting evidence — to put in, if he desired to do so, other modifications of the machine, and to recall and re-examine his experts. And the practical effect of that would be, we think, to repeal the rule, in respect to the examination of witnesses, which is that the plaintiff may examine upon such points in respect to the issue as he desires, and that the defendant, in his cross-examination, is limited to the matters opened by the plaintiff; and if he wishes to prove more by any witness, he must wait until he has opened his case, and then call the witness again, but he must then call him as his own. So in respect to the matters of evidence. The plaintiff, when he opens his case, must put in his affirmative evidence. The defendant, then, in his reply, may put in his evidence ; and the plaintiff is then limited to rebutting testimony. Should a new machine be admitted, and the defendant not be allowed to call back his witnesses, and re-examine them, it would be obvious injustice to the defendant. We think, therefore, that in a just, legitimate, and fair application of the rule, we must refuse to allow the evidence to be put in, in regard to the experiments made upon the new modification of the plaintiff's machine.

The witness was then asked to state the results and character of the experiments he had made, in order to verify his opinion of the difference between the two machines. This question was admitted by the court. At the close of the trial the court charged the jury as follows : —

. . . . Among other proceedings in the suit not necessary to be mentioned, issues of fact were ordered to be tried at law, by an order passed November 19, 1858. Ware, J., sitting. The order was as follows : —

“ This cause having been opened, by reading the bill, answer, and general replication, and it appearing by the answer that the validity of the letters-patent held by the complainants is denied by the respondents, and also that the respondent denies that he has infringed the same, it is

therefore *ordered* by the court, that the parties do proceed to the trial of the following issues, to the jury, to wit : —

“ First. Whether the said Charles W. Cahoon, at the date of his original application for letters-patent, for an improvement in machines for sowing seed and fertilizing materials broadcast, to wit, on the 14th of May, A. D. 1857, was the original and first inventor of all the improvements, or any, and which of them, described and claimed in the specification annexed to the reissued letters-patent, bearing date the 11th of May, A. D. 1858.

“ Second. Whether the said respondent, without the license of the complainants, has, since the day of the reissued letters-patent, made, used, or sold any machine infringing the claims, or any, and which of them, embraced in the specification annexed to the said reissued letters-patent. And it is further *ordered*, that, on the trial of the said issues, the complainants shall be plaintiffs, as in an action at law, and the respondent shall be defendant, and that the same be tried in this court, on the 15th of February, A. D. 1859.

“ ASHUR WARE, *District Judge.*”

CLIFFORD, J. Your attention will be chiefly drawn to the questions presented for your determination in that order. They are two, and should be separately considered and decided. Under the first issue, you are instructed that it is your duty to inquire and ascertain whether Charles W. Cahoon was the original and first inventor of the several improvements in machines for sowing seed broadcast, claimed in the letters-patent, reissued to the plaintiffs; or, in other words, you are to inquire and ascertain whether any one else, prior to the invention by Cahoon, had invented those improvements or any of them, and, if any, which of them. To maintain the issue on their part, the plaintiffs have introduced the reissued letters-patent bearing date May 11, 1858, together with the specification and drawings annexed to the same. They have also introduced a model and proof, tending to show that in all substantial respects it is the same as the original model of the machine now in the Patent Office. You are instructed that the patent, including the specifications and drawings, is *prima facie* evidence that Charles W. Cahoon is the original and first inventor of the several improvements described in the respective claims of his patent, and that the burden of proof is

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upon the defendant to show a prior invention ; and if he has not to your satisfaction, then your finding under the first issue should be for the plaintiffs. Evidence, however, has been introduced on both sides, and it becomes your duty to determine the point, in view of all the facts and circumstances in the case ; but in weighing the testimony you will bear in mind that the burden of proof on this branch of the case is upon the defendant to prove that some other person is the prior inventor of the improvements, or some one of them described in the Cahoon patent, and if not of all those improvements, that the patent is valid for the residue. In considering this question, as well as the one arising under the second issue, it becomes necessary that you should know and carefully observe what those improvements are. That question must be determined by the court, as a question of law, arising upon the construction of the patent, including the specifications and drawings.

You are accordingly instructed that the improvement covered by the first claim is as follows. It consists of a tubular chamber or discharger rotating rapidly on a horizontal axis, so that its outer edge will be in a plane vertical, or nearly vertical, to the horizon, and perpendicular to the line of travel of the machine, and operating, by the centrifugal force generated by the revolution of the chamber or discharger, to throw out the seed in a plane of discharge that is vertical, or nearly vertical, to the horizon, and perpendicular to the line of travel of the machine. It also becomes necessary to define the meaning of the term or phrase, ' tubular chamber or discharger,' as used in this claim of the patent ; and on this point you are instructed that when, taken in connection with the context of the specification and drawings, as it must be, it means a hollow discharger, whose diameter is larger at the place of discharge than at the place of entrance of the seed, which, being placed and operated on a horizontal shaft, so as to bring its outer edge into the described position, will, by the centrifugal force generated by its revolution, throw out the seed broadcast in a plane vertical, or nearly vertical, to the horizon. The plane in which the seed is to be thrown out, and which is required by the terms of the claim

to be vertical, or nearly vertical, to the horizon, is the plane of discharge of the seed, marked by the position of the outer edge or periphery of the discharger, and not the plane or planes through which the seed moves after it has left the discharger in its progress through the air and until it reaches the ground; and such plane of discharge is vertical, or nearly vertical, to the horizon, within the meaning of the patent, when it is substantially the opposite of a horizontal plane, it being the obvious and clearly to be inferred purpose of the inventor to make an apparatus which should operate in discharging seed in a plane as nearly the reverse of a horizontal plane as can in practice be attained.

We will now call your attention to the second improvement described in the patent, which is the one covered by the second claim. It consists of a funnel or conical-shape discharging chamber, having flanches or their equivalents inserted therein, and operating by arresting the seed on its passage from the conducting-tube leading from the hopper, to prevent the seed from dropping upon the ground, and by assisting to carry it round the axis of revolution, to impart to it the necessary degree of centrifugal force in a shorter space of time than the surface of the discharger alone could impart to it; such discharger, so provided with flanches or their equivalents, thus operating, being rapidly rotated on a horizontal shaft, and by means of the centrifugal force thus generated, and the position of the outer edge of the discharger, throwing out the seed in a plane vertical, or nearly vertical, to the horizon. You are also instructed that the expression, "funnel-shaped discharging chamber," in this claim, defines the same thing as the words "tubular chamber or discharger," in the first claim, and means a conical chamber, or one whose diameter is larger at the place of discharge than its diameter is at the place of entrance of the seed; and provided it has that condition of a funnel or conical chamber, and will, with the aid of the flanches or their equivalents, when operated in the described position, do the work described in the patent, it is immaterial whether the cone of the chamber be regular or irregular, or longer or shorter from its apex to its base. In this

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connection, you are instructed that the flanches or their equivalents, described in this claim, embrace any device which, by being placed so as to operate in the discharge of the seed, to prevent its falling directly upon the ground in its passage through the discharger, and to carry it round the axis of revolution of the discharger, and thus to accelerate its centrifugal force, will produce the operation and perform the duty effected by the flanches particularly described in the patent, and shown in the drawings. That all the conditions and limitations of this claim, in respect to the position in which the discharger is to be operated, and the plane of discharge of the seed, are the same as those of the first claim.

You rattention will now be drawn to the third improvement, which is the one covered by the third claim. It is obvious that the words "tubular or funnel-shaped discharging chamber," which are the words of the claim, define the same thing as the words "tubular chamber or discharger," as used in the first claim, and mean the same as the funnel-shaped discharging chamber, described in the second claim. The third improvement consists of a disk or piece of metal, or its equivalent, placed in front of, and combined with, a centrifugal discharger, arranged in the position, and operating to sow seed in the manner explained in relation to the first and second claims; the use of such disk being to prevent the entrance of currents of air into the discharger, which might interfere with the proper distribution of the seed, by blowing it out of its proper position while it is still in the chamber, and by equivalents of this disk are meant any pieces or single piece of metal, whatever may be their shape, or in whatever manner attached to the apparatus, so long as they are properly shaped and properly attached, in such a way as to produce the effects or substantially the same effects, in substantially the same way as are produced by the round flat piece of metal, represented in the drawings of the Cahoon patent.

It will only be necessary for you to examine the fourth improvement, when considering and determining the questions involved and presented for your determination on the first issue. That improvement is the one covered by the fourth claim in the

patent, and consists of a hopper of some kind or other whose office is to hold a supply of seed and deliver it to a discharging chamber rotating rapidly in the position before explained, and acting to sow seed in a plane of discharge, as before pointed out, when the hopper is combined with such a centrifugal discharging chamber, and with a stirrer arranged in the hopper and acting to stir the grain, and also with a gate at the mouth of the hopper, by means of which the opening at the small end of the hopper can be enlarged or diminished, so as to regulate the quantity of grain that will pass out of the hopper, and consequently the quantity of seed that will be sown by the centrifugal discharger in any determined period of time ; and the improvement specified in this claim is one that is claimed when the disk or its equivalent is used, or when it is not used.

Some reference has been made to the motive-power of the machine or machines of the plaintiffs, and upon that subject you are instructed, that, although the specification and drawings describe a particular apparatus for giving motion to the centrifugal discharger and the stirrer described in the patent, and also an apparatus for supporting and moving the machine when in actual use, yet that the means so described for giving motion either to the discharger or to the machine itself do not constitute any part of the invention as described in the claims of the patent, and that the invention would be the same, though other convenient and efficient means were substituted and used for that purpose ; and this remark applies as well to the means employed to transport the machine when in actual use, as to those used for giving motion to the discharger and the stirrer.

Guided by these principles as to the construction of the patent, you will proceed to consider and determine the several questions presented in the first issue ; and upon that subject you are instructed that, in order to invalidate the several claims embraced in the letters-patent, the defendant must show that some one, prior to Cahoon's invention of the several improvements claimed, had invented a machine for sowing seed broadcast, containing the several improvements above described, or some of them ; and the patent is valid for such of the several improvements above

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described as are not thus shown to have been invented by some one else, prior to the invention by Cahoon. On this point you are further instructed, that, in order that any of the models or machines introduced by the defendant should be sufficient to invalidate the patent of Cahoon, it must be shown to your satisfaction that such model or machine is an apparatus which discharges the seed in a vertical plane of discharge, perpendicular, or nearly perpendicular, to the line of travel of the machine, through the agency of centrifugal force, and by means of an apparatus constructed, arranged, and operating substantially as the Cahoon apparatus does, which has already been described, as claimed in his patent. It is insisted on the part of the defendant, to the effect that an apparatus for discharging seed in sowing broadcast, though invented, constructed, and designed to throw out the seed in horizontal planes, and adapted to produce and accomplish that mode of operation, yet if such apparatus, by having certain changes and modifications made in its construction and arrangement, could be adapted to the discharge of seed in vertical planes, that then such apparatus, while in its original form, and unchanged in structure and organization, embodies the principles and mode of operation of the structure and invention described in the Cahoon specification. It is impossible for the court to concur in that proposition. On the contrary, we instruct you that if you shall find that discharging seed in vertical planes, in the manner and by the means described in the Cahoon specification, is a new and useful method of sowing seed broadcast, and that Cahoon, as is claimed in his patent, was the first person to invent and adapt an apparatus so as to accomplish that method of sowing, such prior horizontal machines cannot invalidate his patent. This last instruction is applicable to all the evidence in the case respecting the several models or machines, arranged and designed for discharging seed in horizontal planes by centrifugal force, and revolving on vertical axes. Two of those machines, namely, the S. S. Hogle and Glendy Moody machines, ought also to be considered by you in another point of view, which we will now proceed to state. In respect to those machines, you are instructed to inquire whether

either of those persons made an operating machine, or whether they only made models, or drawings from which machines might be constructed. If the latter only were made, and although such models might be capable of operation for the purpose of experiments, yet unless it is proved to your satisfaction that a machine, or machines, capable of being used for actual agricultural purposes, was or were made prior to Cahoon's invention, then, as matter of law, we instruct you that such alleged inventions never were completed, and cannot affect the validity of Cahoon's patent.

One other model or machine introduced by the defendant remains to be considered. It is the vertical model or machine of Curtis O. Luce, which he says he made in the early part of February, 1856, while he was sick, at his own house, in Freeport, in the State of Illinois. Several questions arise respecting that model, which it is important you should consider and determine, in view of the rules of law applicable to this part of the case. It is insisted, in the first place, by the plaintiffs, that this model or machine never had such an existence as would anticipate the invention of Cahoon, or invalidate the claims in his patent. In the second place, they insist that it was constructed merely as an experimental machine, and that it was subsequently broken up, and the materials used for other purposes, and that its essential parts were lost, and that the supposed invention was abandoned. Both of these questions must be determined by you from the evidence, under the rules of law which we will presently state. In considering the first question, that is, whether the model or machine had such an existence as would anticipate the Cahoon invention or invalidate the claims in his patent, you will inquire, in the first place, and determine from the evidence, whether it was made and completed prior to the invention of Cahoon; and, in the second place, whether in point of fact it was a machine, embodying the improvements, and which of them, claimed by Cahoon, as above described; and if you find that it was not made and completed prior to the invention of Cahoon, or if so made and completed, that it did not embody any of the said improvements, as already

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defined, then you are instructed that it cannot have the effect to anticipate the Cahoon invention, or to invalidate the claims set forth in his patent. Should you find that it was made and completed prior to the Cahoon invention, and that it did embody the improvements in the Cahoon patent, as already defined and explained, you will then inquire whether it was, in point of fact, a machine completed and reduced to practice in contradistinction to an experimental machine, or a machine made by the supposed inventor, in the prosecution of experiments and inquiries, and that unless it appears to your satisfaction that such machine was actually used as a seed-sower in sowing seed for agricultural purposes, you are warranted in presuming that it was a mere experiment, and if so, you are instructed that it would not invalidate the plaintiff's patent, provided Cahoon was an original inventor of his improvements without knowledge of that machine, and did not derive any of them from Luce. It is insisted by the defendant, in answer to the several propositions of the plaintiff now under consideration, that Cahoon cannot be regarded as the original and first inventor of the improvements claimed in his specification, if it appears that a model or machine like the one now introduced was made and completed by Luce, in February, 1856, even though it also appears that it was afterward broken up, its materials used for other purposes prior to the invention of Cahoon, the essential parts of it lost, and the invention abandoned. His argument proceeds upon the ground that no one can be the original and first inventor of a thing once constructed, so long as the remembrance of the thing remains in the mind, or can be called to the recollection of any one still living, who had previous knowledge of its existence.

A patent is authorized by the sixth section of the act of Congress of the 4th of July, 1856, where the party has discovered or invented a new and useful improvement, not known or used by others before his discovery or invention. By the fifteenth section it is provided, that, if it appears on the trial of an action, brought for the infringement of a patent, that the patentee was not the original or first inventor, or discoverer of the thing patented, the verdict shall be for the defendant. Those particular

words, if construed literally, would afford some countenance to the argument of the defendant. That construction, however, has been denied by the Supreme Court, upon the ground that it would not carry into effect the intention of the legislature. Another clause of the fifteenth section of the same act provides, that if it shall appear that the patentee believed himself to be the first inventor, the patent shall not be void on account of the invention, or discovery, having been known or used in any foreign country, it not appearing that it had been patented, or described in any printed publication. In the case thus provided for, the party who invents is not, strictly speaking, the first and original inventor; but the law in such a case, says Chief Justice Taney, in *Gayler et al. v. Wilder*, 10 How. 477, assumes that the improvement may have been known and used before his discovery. Nevertheless, his patent in that case is valid if he discovered it by the effort of his own genius, and believed himself to be the original inventor; and the court go on to say, that the clause in question qualifies the words before used, and shows that by knowledge and use the legislature meant knowledge and use accessible to the public. You are accordingly instructed to inquire and determine, from the evidence, whether Luce made his alleged invention of the vertical machine public, and if he did not, but had used it for no purpose, except simply for his own private experiments, and if it had been broken up prior to the 14th of May, 1857, and its materials used for other purposes, and its essential parts lost, and the invention forgotten or abandoned, that such an invention and use would be no obstacle to the taking out of a patent by Cahoon, or those claiming under him, and that the model, or machine, now in evidence, on that state of facts, would not invalidate the Cahoon patent, if he was an original inventor of his improvements, without any knowledge of said machine, and did not derive any of them from Luce. Upon this same subject you are also instructed, that, as a single specimen only of such a machine was made, whether capable of use, and whether actually used, or not, by the party making it, for the purpose of testing its operation, if you find from the evidence that the same was kept in his own possession from the knowledge

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of the public, and was subsequently broken up and its materials used for other purposes, or that the substantial parts of it were finally lost, prior to the 14th of May, 1857, and that its construction was only recalled to the memory of the maker by the present controversy, and when so recalled, that the essential parts of the machine did not exist, so that the public could derive the knowledge of it from the machine itself, but only from the memory of the alleged inventor, the existence of such prior machine will not invalidate the patent under consideration, even if the invention of Cahoon was subsequent in date, and although such machine may have embodied all of the improvements subsequently invented by Cahoon, if he was an original inventor of his improvements, without knowledge of such machine, and did not derive any of them from Luce.

In view of the rules of law, as you have received them from the court, you will proceed to examine all the models, or machines introduced by the defendant on this branch of the case, and compare them with the improvements described in the Cahoon patent, as already construed and defined, and with the machine introduced by the plaintiffs so far as they are constructed and arranged in substantial conformity to the principles and mode of operation therein claimed and described. Difference in size and proportions, so long as the construction, arrangement, principles, and mode of operation are substantially the same, is entirely immaterial. Any machine made by the patentee, or those claiming under him, whose construction, arrangement, principles, and mode of operation are substantially the same as the one described in the specification, though differing in size and proportions, is as much within the protection of the patent as the structure therein described, provided it is of sufficient size, and has the proper proportions to accomplish the requisite work, and actually accomplishes it, substantially by the same means and substantially in the same way. According to the testimony of Curtis O. Luce, his model of the vertical machine was made in February, 1856, as before remarked, while he was residing at Freeport, in the State of Illinois, and it was in that State that all his experiments with it were made. He says that the model in

evidence is the identical machine he made, excepting the distributing-wheel and the hopper, and he thinks the wheel and the hopper now on the model are substantially the same as the ones he originally constructed. That wheel was built by one Taylor, under his directions, for which he paid him a half-dollar. He does not say who built the motive-power, but does say that he had it on hand, and that it was built before he was sick, for another purpose. It is a vertical model, constructed and arranged on a horizontal axis, and the witness says it was intended for rapid revolution. He used it more or less in a shop, thirty or forty by sixty feet, from the middle of February, 1856, to April of that year, and occasionally afterwards, to show its operation to friends. The cast, as he says, was about thirty feet, that is, fifteen feet on each side of the line of travel, and the witness says that he has operated the machine, once with the wheel and hopper now on it, which were constructed at Westbrook in this State, at the request of the defendant, since the commencement of this trial. Only one person knew of his invention, and that was John Taylor, who made the original seed-wheel, and he assigns the reasons why he kept it secret, which need not be repeated, as they must be within your recollection. He thinks it was a practical machine, and says he used it to sow seed in the shop a good many times, but did not make any experiments with it in the field at Freeport, for the reason that from February to April there was snow on the ground, and no other machine was made for use. The brass part of the machine was made for another purpose, but was not completed, and he finished it up, and thinks he added the axis. Afterwards he removed from Freeport in the State of Illinois, to Brandon in the State of Vermont, where he now resides. When he moved he took the machine apart, that is, he took off the hopper and wheel, and put the whole machine, thus separated, in his tool-chest. Shortly after he made this model he made another in a different form, that is, the horizontal machine, which is also introduced by the defendant. He went to New York the last of April, 1856, and while there had a conversation with Messrs. Munn & Co., patent solicitors, and he says

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he explained to Mr. Munn the operation of both machines. His invention for the horse-power machine was patented, and his right of the same, within the territory of New England and the city of New York, he has sold to Nourse and Mason. On his own account he has made thirty-nine of his horse-power machines since he has resided in Brandon, and has five more under way. You will recollect the fact that the horse-power machine is constructed on a vertical axis, and that the wheels revolve in a horizontal plane of discharge. His vertical or upright machine was never patented, and only one specimen of it was made, namely, the one already introduced, which was carried to Brandon, in the State of Vermont, in his tool-chest. His chest was kept in a closet, or in some other small apartment, in his house, and he states that his boy, a small lad, used to take out the machine and play with it, and he supposes lost it. When he last saw it he does not remember whether or not it was all together, and where it was at that time he cannot tell. He was twice visited by the defendant, during the last fall, and at one of those interviews the defendant, in a conversation about machines, inquired how he came to get up one, and in that conversation the witness thinks he referred to the vertical machine. At that time he did not know whether he could find it or not, but upon looking he found the brass part in a box in his house, and showed it to the defendant. It then had neither hopper nor wheel; those, as before remarked, had been lost, and the ones now exhibited have been made by the witness at the request of the defendant, since the adjournment of this case in June last. When he went to New York the only model he had with him was the one for the horse-power machine, which is now in the Patent Office. He says he had no drawings, but that he explained what he had made, and wanted to claim both principles, but that Munn told him it was unnecessary; that if he obtained a patent for one of the principles, he could use the machine either way. Evidence has been introduced to affect the credit of this witness, and it is proper that you should take that testimony into consideration, and determine for yourselves how far you can rely upon his statements. His deposition taken *de*

bene esse, under the act of Congress, at the request of the plaintiffs, has been introduced to contradict the witness. In that deposition he says: "I gave a description of the machine that I patented, and also the first machine I made, for which I did not apply for a patent, and which was a hand-sower with one wheel, vertical upon a horizontal shaft, the grain passed into a tube or wheel, closed in front, and was thrown out vertically through apertures formed for that purpose, something like a water-wheel. I never made but one machine of that kind; there was nothing inside the machine to stir the grain; that machine was taken apart and some of the materials used for other purposes." Anson A. Nicholson has also been called as a witness for the plaintiffs, and testifies to certain declarations made by Luce, on two occasions, which are introduced for the purpose of contradicting him. All these matters are for your consideration. On the side of the defendant, the witness, Luce, was recalled, by consent, and his explanations are also before you. It is for you to determine, upon the whole evidence, what degree of credit, if any, you can safely give to the statements of the witness.

Other machines are also introduced by the defendant, as having a tendency to show that Charles W. Cahoon is not the original and first inventor of the improvements described in his patent. Among the number is the machine of Glendy Moody, which is before you in two or three forms. He was called as a witness, and his testimony has been reviewed by the counsel on both sides, and need not be repeated. Like the horse-power machine of Luce, those models are constructed and arranged on a vertical axis, and it will be for you to determine whether they were not evidently constructed, arranged, and designed to discharge seed in a horizontal plane of discharge. In such machines the seed-wheel revolves in a horizontal plane, and, so far as position is concerned, they are the opposite of the Cahoon machine, as it is described in his specification. Moody applied for a patent, and his application was rejected, on the 23d of April, 1846. S. S. Hogle's machine is the last in the series introduced by the defendant. Its history is derived chiefly from the testimony of Henry D. Lathrop. He was a work-

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man in the employment of S. S. Hogle, who resided in Bedford, in the State of Ohio, at the time the machine was made. Models of this machine, in two or more forms, are in the case. In all of them, the seed-wheel, or discharger, is constructed upon a vertical axis, and revolves in a manner to discharge seed in a horizontal plane of discharge. Drawings of a vertical, or upright machine, made with chalk, are mentioned by the witness, Lathrop, in the course of his testimony, which has been the subject of remark by the counsel on both sides. It seems they were made, and presently effaced to give place to others of an experimental character. No such model was ever made, and of course none such could have been used. All the remark we think it our duty to make respecting those drawings, if such they may be called, is, that such testimony is entitled to very little weight, if any, in the determination of the questions under consideration.

Experts have been examined upon both sides, respecting the differences and similarities of the several models, as compared with the several improvements described in the plaintiffs patent. Their opinions are evidence for your consideration, and it is within your province to determine what weight the testimony ought to receive. Three such witnesses have been examined, by the plaintiffs, and two by the defendant. Differences are observable in their testimony, and those differences have been very fully considered, and discussed by the counsel for the respective parties. All we desire to say further upon this branch of the case, is to remind you that the burden of proof on the several questions presented on this issue is upon the defendant; and we think you ought to give the matter a very deliberate consideration, before you reach the conclusion, upon this evidence, that Charles W. Cahoon was not the original and first inventor of the improvements described in his patent, as they have already been defined by the court.

Should you find that he is not the original and first inventor of any of the improvements so described and defined, then your verdict should be for the defendant, on all the questions involved in both issues. Want of novelty renders the patent invalid, and of course there can be no infringement of a right which has no

existence. On the other hand, should you come to the conclusion that Charles W. Cahoon was the original and first inventor of the improvements in his patent as described and defined, you will then proceed to the consideration of the questions presented in the second issue. At this point it becomes necessary to make a brief reference to the pleadings in the suit. It is charged in the bill of complaint, that the respondent, in violation of the exclusive rights of the complainants, hath since the date of the re-issued letters-patent, and without license from them, made, used, and sold large quantities of machines, substantially and in principle embracing in construction and mode of operation a certain feature of the invention described in the plaintiffs' patent. In effect the answer denies that the defendant has made any machine which in principle embraces in construction and mode of operation any feature of the Cahoon invention. It admits, however, that the defendant has made a few machines for seeding, in strict accordance with the description contained in his specification. Considering the answer, in connection with the bill, as it must be considered, the effect is, that the defendant has conclusively admitted that he did make a few of his own machines after the date of the reissued patent, and before the time when the bill in this case was filed. But he does not admit that the machines he so made infringe the improvements defined and described in the Cahoon patent. On the contrary, he alleges and claims a full and perfect right to make and vend such machines.

These remarks will be sufficient to show you the exact nature of the question. It is, whether the machines made by the defendant, and admitted in the answer, do or do not infringe the improvements, and which of them in the plaintiffs' patent, as already defined and described. In other words, the defendant admits that he has made a few machines according to his own patent, but denies that those machines as made constitute an infringement of the claims in the plaintiffs' specification, and relies upon his own patent to justify his acts in making the machines. On the question of infringement, as thus explained, the burden of proof is upon the plaintiffs, to show to your satisfaction that the machines of the defendant, which it is admitted he

made, do infringe some one or all of the claims of the patent under which they derive their title. Whether they do so or not is a question of fact, to be determined by you from all the evidence in the case, under the rules of law, which we will now proceed to state.

Your attention will be first directed to the several improvements of the plaintiffs' patent, in the order in which they stand in the specification, and as they have already been construed and defined. They are as follows: —

[Here follows a recital of the four claims as printed.]

Commencing with the first improvement, you are instructed to find that the defendant's machine infringes the first claim of the plaintiffs' patent as already construed; if you find that his machine contains a tubular chamber or discharger, or a funnel-shaped discharger, having the position of its axis and of the plane of discharge substantially the same as embraced in the plaintiffs' first claim, as already defined, and operating to sow seed in substantially the same way, that is to say, by centrifugal force, in a vertical plane of discharge perpendicular to the line of progress of the machine, by receiving the seed near its centre, by transferring it to the periphery or outside, and during such passage of the seed giving to it centrifugal force, and finally discharging the seed from the part of the discharger farthest from its axis in a vertical plane of discharge, — and you will also find that the machine of the defendant infringes this claim as already defined and explained, if you find in his machine a substantial equivalent of a discharger arranged and operating substantially in the way and by the means just pointed out and described, and by an equivalent is meant something that does substantially the same thing in substantially the same way. But if you do not find that the defendant's machine contains a discharger, operating and arranged as has just been described, or a substantial equivalent of it, then, so far as this claim is concerned, you will find that the defendant's machine does not infringe.

Whether your finding on this point is for the plaintiffs or for the defendant, you will then proceed to consider the question of infringement so far as regards the second improvement, in the

plaintiffs' patent; and you are instructed to find that the machine of the defendant infringes the second claim in the defendant's patent as already defined, if you find in his machine a centrifugal discharger, or its equivalent in arrangement and manner and means of operating, as just described, in combination with flanches or the equivalents thereof as described in the plaintiffs' patent, the office of the flanches or their equivalents being to strike against the seed after it has entered the discharging chamber, and carry the seed round in front of the flanches, thus imparting to the seed centrifugal motion more rapidly than it would be by the discharging chamber alone, and preventing the seed from falling to the ground before it acquires centrifugal force; and if you do not find in the defendant's machine substantially this combination, or the equivalents of it in all its parts, in substance and reality, you are to find that the machine of the defendant does not infringe this second claim.

Irrespective of what your finding may be on the first and second claims, you will then proceed to consider the question of infringement, so far as regards the third claim of the plaintiffs' patent as already construed and defined; and on this point you are instructed to find that the machine of the defendant infringes this claim, if you find in the defendant's machine a disk or the equivalent thereof, combined with a centrifugal discharger, or tubular or funnel-shaped discharging chamber, or the substantial equivalent thereof, arranged and operating as has been explained in reference to the plaintiffs' first claim, the work performed by this disk being to prevent currents of air from blowing into the discharging chamber, and interfering with the proper arrangement, and consequently with the proper distribution of the seed; and if you do not find in the defendant's machine this combination or the equivalent for each member of the combination acting when so combined, substantially in the manner set forth in the plaintiffs' patent as already defined, then you are to find that the machine of the defendant does not infringe this third claim.

No instructions will be given you under the second issue, in respect to the fourth claim, as it is not contended by the counsel for the plaintiffs that the machine of the defendant in any manner infringes the fourth improvement in the plaintiffs' patent.

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These are all the instructions we propose to give you upon the matters involved in the issue now under consideration, except to lay down certain rules by which you ought to be guided and governed in comparing these machines, or the several devices or elements of which they are composed. With a view of doing justice to both parties, and as matter of law, we instruct you, that, in determining the several questions of infringement, you are not to judge about similarities, or differences, by the names of things, but are to look to the machines, or their several devices or elements, in the light of what they do, or what office or function they perform, and how they perform it; and to find that a thing is substantially the same as another, if it performs substantially the same function or office in the same way, to attain the same result; and that things are substantially different when they perform different duties, or in a different way, or produce a different result. For the same reason, you are not to judge about similarities, or differences, merely because things are apparently the same, or different apparently in shape or form; but the true test of similarity, or difference, in making the comparison, is the same in regard to shape or form as in regard to names; and in both cases you must look at the mode of operation or the way the parts work, and at the result, as well as the means by which the result is attained. In all your inquiries about the mode of operation of either machine, you are to inquire about and consider more particularly those portions of a given part which really do the work, so as not to attach too much importance to the other portions of the same part, which are only used as a convenient method of constructing the entire part under consideration. You will regard the substantial equivalent of a thing as being the same as the thing itself, so that, if two machines do the same work, in substantially the same way, and accomplish substantially the same result, they are the same; and so if parts of the two machines do the same work in substantially the same way and accomplish substantially the result, those parts are the same, although they may differ in name, form, or shape; but in both cases, if the two things perform different work, or in a way substantially different, or do not

accomplish substantially the same result, then they are substantially different.

Slight differences in degree cannot be regarded as of weight in determining a question of substantial similarity or substantial difference. One thing may be a little longer or a little shorter than another, or it may work a little better or a little worse, and yet the two may be substantially the same; and whether they are so or not, and whether the difference in degree is sufficient to constitute a substantial difference in the thing or not, are questions of fact for your determination. Mere difference in degree, however, when properly applied to the facts of the case, in comparing these machines, or the several devices or elements of which they are composed, is entitled to very little weight.

Several days have been spent upon this branch of the case, in the examination of the experts called on the one side and the other; and every point arising out of their testimony, so far as it is applicable to a comparison of these machines, or their several devices, has been fully argued by the counsel on both sides. In view of all the circumstances, we do not think it expedient or necessary to repeat the testimony. The experts have not only given their opinions on these questions, but have very fully stated the reasons on which their opinions are founded, and both their opinions, and the reasons given for them, have been fully discussed at the bar. Those called by the plaintiffs have stated to you, in very strong terms, that in principle and mode of operation the two machines are substantially the same. One at least of those called by the defendant is equally positive that they are substantially different, and whether the other ought to be regarded as having expressed an equally confident opinion in the same direction or not is a question for your consideration, as you understand it. It is your duty to consider and weigh all the testimony in the case, whether offered by the plaintiffs or the defendant, and to give it such weight as in your judgment it is entitled to receive.

Several witnesses were called and examined by the plaintiffs, to prove certain declarations made by the defendant, during the negotiations for an agency, which at one time, it seems, both the

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defendant and the patentee, as well as one of the plaintiffs, supposed he would have for the sale of the plaintiffs' machine, in one of the Western States. Other declarations of the defendant are also in testimony, which appear to have been made about the time, or shortly after those negotiations were broken off. Those made during the negotiations were offered, as tending to prove that the defendant then had the opportunity and facilities for becoming acquainted with the construction and mode of operation of the plaintiffs' machine, before his own invention was made. Those declarations should be considered in connection with the explanations made in this trial by the defendant, when he was called and examined as a witness upon the stand. One of the declarations, apparently falling within the second class, appears to stand upon a different footing. William R. Sawyer testifies to the effect that he asked the defendant one day if he was going out West to sell machines for one of the plaintiffs. The defendant said no; he was going to have one of his own, and added, "he had seen all he wanted to see." It is your province to determine what the defendant meant when he said, "he had seen all he wanted to see," and you will give the remark, if you believe the defendant made it, just such weight as you think it is entitled to receive. Witnesses have also been called on both sides as to the operation of the plaintiffs' machine in the field. That testimony was admitted merely as explanatory of the operations of the machine, and it is your duty to consider it only in that point of view. You will not omit to compare the machines, as they are described in the respective patents, and you should decide the several questions presented in this issue, in view of all the evidence in the case, applicable thereto, giving all due consideration to the arguments of the counsel on the one side and the other, and to the suggestions of the court. Evidence not in the case you cannot and ought not to consider. Trial by jury, though an inestimable right, is not a trial without a court, and it is not so regarded either by the Constitution of the United States or by the laws of Congress. It is as much the duty of the court to determine questions raised, as to the admissibility of evidence, as it is that of the jury to determine its weight, after

it is received. It is the imperative duty of the court to rule out testimony which in law is not admissible; and should the court omit to perform that duty when objection is seasonably made, it would afford ground of exception, and, if subsequently found to be materially objectionable, would make it necessary to grant a new trial, and, if not so corrected, the judgment of the court, in ordinary proceedings, might be reversed on appeal, if in equity, or by writ of error, if it was a proceeding at law. You will take it, therefore, to be law, for the purposes of this trial, that all testimony offered in this case, and not admitted, was properly rejected, and you will give it no consideration whatever. All the questions raised will hereafter be reviewed in due form of law, and if any substantial error has been committed, it will be corrected. Errors of the court cannot be corrected by the jury; and should the jury assume that province, it might, and in many cases probably would, lead to still greater errors, for which, under our system of jurisprudence, there is no adequate remedy. All the evidence in this case is for your consideration, and it is your imperative duty not to consider any matter of evidence not admitted, and consequently not in the case.

The jury returned a verdict for the plaintiffs upon both the issues.

A motion for new trial was made by the respondent, in which exception was taken to most of the material features of the charge, and the rulings of the court rejecting the testimony offered by respondent, and admitting that proposed by the complainants, before explained. This motion was overruled. Before the hearing on the motion for new trial, the time for taking testimony had expired, and the complainants insisted, when the case came up in the equity side of the court, that they were entitled to a final decree upon the verdict of the jury and the testimony taken on the trial of the issues of fact, and moved the court accordingly; but the court declined to grant the motion, and gave the parties further time for taking testimony for the final hearing. The parties then filed in the cause a written stipulation, that evidence taken at the trial of the issues should be deemed taken and published as taken for the final hearing under

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the equity rules, but that either party might suggest any alleged errors; and power was conferred upon the court to make all necessary and proper corrections. By the terms of the stipulation it was also agreed that either party might take and file in the cause, within the time limited for taking testimony, any further evidence not embraced in that introduced in the trial of the feigned issues, and might offer the same at the final hearing, together with any documentary evidence which was rejected at the trial; but the effect or admissibility of all such was to be decided by the court. The models and machines used at the trial, and most of the rejected documentary evidence, were accordingly offered at the final hearing, and received without objection.

G. T. Curtis and *E. and F. Fox*, for complainants.

W. Whiting and *Shepley and Dana*, for respondent.

CLIFFORD, J. According to the bill of complaint, the invention secured to the complainants by the reissued letters-patent consisted, among other things, in constructing a tubular chamber or discharger for the purpose of throwing the grain, seed, &c., from the machine, by giving to it a centrifugal force, derived from the rapid revolution of the discharger, and in so placing and revolving the discharger in a horizontal position, that the outer edge or periphery of the discharger will be in a plane vertical, or nearly vertical, to the horizon, and the grain, seed, &c., will be thrown by a centrifugal motion away from the centre of a circle whose plane is thus vertical, or nearly vertical, to the horizon. It is this feature of the invention that is described in the bill of complaint as the one involved in the controversy, and is the same as that described in the first three claims of the reissued letters-patent. Recurring to the specification, it will be seen that the patentee claims, first, the employment of a tubular chamber or discharger, rotating rapidly in a horizontal position, so that its outer edge or periphery will be in a plane vertical, or nearly vertical, to the horizon, and thereby communicating a centrifugal motion to the grain, seed, &c., away from the centre of a circle whose plane is thus vertical, or nearly vertical, to the horizon; secondly, he claims the employment of a funnel-shaped

discharging chamber, for the purpose, and rotating in the position above described, having spiral flanches or their equivalents inserted therein, and operating to arrest the too direct flow of the grain, seed, &c., through the discharger, and retaining it therein, until the necessary centrifugal force is communicated to it before it leaves the discharger, as above described; and, thirdly, he claims the combination and use of the above-described and above-claimed tubular or funnel-shaped discharging chamber, rotating in the position above described, with the disk placed and operating in the manner above described. Those three claims of the patent are involved in the controversy, and two principal questions are presented by the pleadings. Complainants allege that Charles W. Cahoon is the original and first inventor of the improvements therein described, and that the respondent, after the reissued letters-patent were issued, and before the filing of the bill of complaint, had made, used, and sold large quantities of machines substantially and in principle embracing those improvements. Both of those allegations are denied in the answer of the respondent. He denies that Charles W. Cahoon is the original and first inventor of the alleged improvements, or either of them; and he also denies that he ever made, used, or sold any machine containing any improvement claimed by complainants. But the last denial is accompanied by the admission that he had made and sold a few machines constructed in strict accordance with the description contained in the specifications of his own patent, which, as he insists, he had a full and perfect right to make and vend. To maintain the issue on their part, so far as respects the novelty of the invention, the complainants, in the first place, introduced the reissued letters-patent, together with the model and the drawings annexed to the specification. They also introduced certain machines, and offered proof to show their operation, and that they were constructed according to the specifications of the reissued letters-patent. Unquestionably, the patent, accompanied by these proofs, was *prima facie* evidence that the patentee was the original and first inventor of the improvements, and accordingly the court instructed the jury, at the trial of the

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issues of fact, that, upon the introduction of that evidence, the burden of proof, so far as the novelty of the invention was concerned, was shifted upon the respondent to show a prior invention, and consequently that if he had not done so, to their satisfaction, then their finding under the first issue should be for the complainants. Evidence, however, was introduced on both sides ; and to enable the jury to apply it understandingly, it became necessary for the court to construe the patent of the complainants. Those instructions were subsequently reviewed by the court at the hearing of the motion for new trial, and fully affirmed, and they are now adopted by the court as a correct exposition of the several claims of the patent under consideration. Commencing with the improvement covered by the first claim, we are of the opinion, and accordingly hold that it consists of a tubular chamber or discharger, rotating rapidly on a horizontal axis, so that its outer edge will be in a plane vertical, or nearly vertical, to the horizon, and perpendicular to the line of travel of the machine, and operating, by the centrifugal force generated by the revolution of the chamber or discharger, to throw out the seed in a plane of discharge that is vertical, or nearly vertical, to the horizon, and perpendicular to the line of travel of the machine. Tubular chamber or discharger, as the term is used in this claim of the patent, means, when taken in connection with the context of the specification and the drawings, a hollow discharger whose diameter is larger at the place of discharge than at the place of entrance of the seed, and which being placed and operated on a horizontal shaft, so as to bring its outer edge into the described position, will, by the centrifugal force generated by its revolution, throw out the seed broadcast, in a plane vertical, or nearly vertical, to the horizon. To prevent any misunderstanding, it is necessary to remark that the plane in which the seed is to be thrown out, and which is required by the terms of the claim to be vertical, or nearly vertical, to the horizon, is the plane of discharge of the seed, marked by the position of the outer edge or periphery of the discharger, and not the plane or planes through which the seed moves after it has left the discharger, in its progress through the

air, and until it reaches the ground. Looking at the language of the claim, it is obvious that the inventor intended to make an apparatus which should operate in discharging seeds in a plane as nearly the reverse of a horizontal plane as can in practice be attained, and such plane of discharge, we think, is vertical, or nearly vertical, to the horizon, within the meaning of the patent, when it is substantially the opposite of a horizontal plane.

Attention will now be called to the second improvement, which is covered by the second claim. It consists, in our view, of a funnel or conical-shaped discharging chamber, having flanches or their equivalents inserted therein, and operating by arresting the seed on its passage from the conducting tube leading from the hopper, so as to prevent the seed from dropping upon the ground, and by assisting to carry it round the axis of revolution, so as to impart to it the necessary degree of centrifugal force in a shorter space of time than the surface of the discharger alone could possibly do, without such aid. Such discharger, like the tubular one mentioned in the first claim, rotates rapidly on a horizontal shaft, and by means of the centrifugal force thus generated, and the position of the outer edge of the discharger, throws out the seed in a plain of discharge vertical, or nearly vertical, to the horizon, as described in respect to the other claim. Funnel-shaped discharging chamber, as the term is used in this claim, signifies the same thing as the words "tubular chamber or discharger" in the first claim, and means a conical chamber, or one whose diameter is larger at the place of discharge than at the place of entrance of the seed. Whether the cone of the chamber is regular or irregular, or longer or shorter from its apex to its base, is, we think, wholly immaterial, provided it has the above-described condition of a funnel or conical chamber, and will, with the aid of the flanches or their equivalents, when operated in the described position, do the work specified in the patent. "Tubular or funnel-shaped discharging chamber" are the words of the third claim, and it is obvious that they mean the same thing as the words "tubular chamber or discharger," used in the first claim, or "funnel-shaped discharging chamber," employed in the second claim. As described,

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the improvement consists of a disk or piece of metal or its equivalent placed in front of, and combined with, the centrifugal discharger arranged in the position, and operating to sow seed in the manner explained in relation to the first and second claims. Such disk is used to prevent the entrance of currents of air into the discharger, which might interfere with the proper distribution of the seed by blowing it out of its proper position while it was still in the chamber. Considering the use of the disk, it is clear, we think, that the word "equivalent," as applied to it, must have a pretty broad signification, so as to include any pieces of metal, whatever may be their shape, or in whatever manner attached to the apparatus, so long as they are properly shaped and properly attached in such a manner as to produce the same effect or substantially the same, in substantially the same way as is produced by the round flat piece of metal represented in the drawings of the complainants' patent. Infringement is not charged in the bill of complaint in respect to the improvement described in the fourth claim, but it becomes necessary to advert to it under the first ground of defence set up by the respondent. It consists of a hopper of some kind or other, whose office is to hold a supply of seed, and deliver it to a discharging chamber, rotating rapidly in the position before explained, and acting to sow seed in a plane of discharge, as before pointed out, when the hopper is combined with such a centrifugal discharging chamber, and with a stirrer, so called, arranged in the hopper and acting to stir the seed, and also with a gate at the mouth of the hopper, by means of which the opening at the small end of the hopper can be enlarged or diminished, so as to regulate the quantity of seed or grain that will pass out of the hopper, and consequently the quantity that will be sown by the centrifugal discharger in any determined period of time.

Upon the first issue, the jury found that Charles W. Cahoon, at the date of his original application, was the original and first inventor of each and all of the improvements described and claimed in the specification. Additional evidence was, however, introduced at the final hearing, pursuant to the stipulation in the

cause ; but after a careful revision of the whole, we are of the opinion that the respondent utterly fails to show a prior invention, or that the same was old, well known, or in public use, as alleged in the answer. Some of the letters-patent and other documents introduced at the final hearing had been rejected at the trial of the issues, and are now for the first time before the court as evidence in the cause. Under those circumstances, it seems to be proper that the whole evidence should be reviewed, both in connection with the verdict, and also as if no issues of fact had been tried by a jury. Letters-patent to Levi Rice, dated August 21, 1837, were offered in evidence by the respondent. When offered to the jury it was rejected, but is now admitted, under the stipulation filed in the cause. It was a patent for a centrifugal disseminator, consisting of a horizontally revolving platform with radiating cleets to strengthen the platform, and give additional force to the distribution. He also introduced a rejected application of Glendy Moody, filed the 3d of December, 1845, and rejected on the 23d of April in the following year. It purported to be an application for a patent for an improvement in machines for sowing seeds broadcast, and is described as a hollow discharger, consisting of hollow arms or spouts, radiating from a central vertical shaft at right angles to the discharger, constituting a series of passages, radiating from a common central position. Two small wooden models were made by the alleged inventor, in conformity with the description in the application, but it does not appear that he ever made a working machine. His application was rejected at the Patent Office, because the alleged invention was the same as that of Rice, already described. Pursuing the order of the date of the documents, we come next to the application of S. S. Hogle, which was also introduced by the respondent at the final hearing. It was for a machine consisting of a reversed conical shell terminating in a flange surrounding its base, and having inside of it another cone or conical disk, also terminating in a similar flange, and both revolving together on a vertical shaft, so that the grain is thrown out horizontally between the flanges. It was presented to the Patent Office August 16, 1855, and on the 14th

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of September following was rejected, because it was for the same invention as those of Rice and Moody. Divers experimental models were made by Hogle, conforming to the description in his application; and, according to his testimony, one of them was used by him to sow to some small extent, during the season of 1855. The respondent also introduced the rejected application of William N. Tebbets, which was filed April 12, 1856, and rejected on the 16th of the same month, because the alleged invention was the same as that of Glendy Moody. According to the application, it was for an improvement consisting of a hollow tube and radial arms turning on a vertical shaft. Certain letters-patent were also introduced by the respondent, which should be noticed in this connection. Of these one was the patent to Enos Stinson, which is dated May 6, 1856, and was for a machine consisting of a horizontal rotating arm or tube provided with valves at the ends so as to cut off the flow of the seed while the end of the tube is passing forward through one half of its revolution, and to let the seed flow as the tube passes toward the rear through the other half of the same revolution. Another of the patents introduced is the one granted to C. O. Luce, on the 10th of June, 1856, which was for a machine consisting of two horizontal distributing wheels, which throw out the seed by centrifugal force, and the claim is for the wheels in combination with certain slides or valves for cutting off the flow of the seed, although it is admitted that the wheels are old. Evidence was also introduced by the respondent tending to show that the same C. O. Luce also made another experimental model or machine consisting of a small tin distributing wheel, which he operated upon a horizontal shaft in connection with a small tin hopper; but the weight of the evidence shows that it was a mere experiment, and that the experiment in that form was abandoned. Respondent also introduced the patent of E. K. Haynes, which was granted the 23d of December, 1856. It was for an improved machine consisting, as described, of a scattering-wheel, the central part of which is conical, and the other part is a flat horizontal circular plane. As described, the conical part of the wheel is armed with wings, which, when put in motion, cre-

ate currents of air, showing that the invention, if any, consists of a species of fan-blower combined with a horizontal centrifugal distributor. Comment upon the patent of H. Bonham for the corn-planter is quite unnecessary, as it is scarcely contended by the respondent that it can have any material bearing in the case. Included in this list are some seven or eight alleged prior inventions, but it is obvious, even without much investigation, that with the exception of the abandoned experiment of C. O. Luce, they are all constructed and designed to revolve on vertical shafts, and to discharge seed or grain in a horizontal plane of discharge. They all have vertical shafts, and in all of them the seed is poured down upon all sides of the shaft, and falls upon the surface of a turning-table or some other device performing substantially the same functions, and runs out from the centre to the circumference, by the centrifugal force generated by the revolution, aided, in some of the machines, by cleats, and in others by enclosed arms, passages, or tubes, or some equivalent devices. But such is not the principle or mode of operation exhibited in the machine of the complainants. Their machine has a conical chamber receiving the seed on one side of the shaft, at or near the smaller diameter of the chamber, which, being placed on a horizontal shaft and rapidly revolved, causes the seed or grain to travel centrifugally around and away from the axis of revolution towards the larger and outer diameter of the chamber, where it is thrown out broadcast in a vertical plane of discharge. Attempt was also made by the respondent to show that the improvement of the complainants was old, well known, and in public use prior to the alleged invention by the original patentee, but the evidence wholly fails to establish the allegation; and, having stated our views very fully on this point in overruling the motion for new trial, we do not think it necessary to repeat them on the present occasion. At the final hearing the original patent of Cahoon, together with the application and the correspondence with the Patent Office, were offered in evidence by the respondent. When the offer was made the court inquired of the counsel making the offer, on what grounds, and for what purpose, the offer was made; but no explanations were given.

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Under the circumstances, we reject the evidence, as we are not able to perceive that in any point of view it would be material. Fraud in obtaining the reissued letters-patent is not implied, and no question arises as to the date of the original invention. *Phil. and Tren. R. R. Co. v. Stimpson*, 14 Pet. 448; *Stimpson v. Westchester R. R.*, 4 How. 380; *Bættin v. Taggart*, 17 How. 74. Suffice it to say, without entering more into detail on the point of novelty of the invention, that we are of the opinion that Charles W. Cahoon is the original and first inventor of the several improvements described in the specification of the reissued letters-patent.

Considering the answer in connection with the bill of complaint, the effect is, that the respondent has conclusively admitted that he did make a few machines within the period specified in the bill of complaint. He does not admit that the machines he so made infringe the patent of the complainants, but he does admit that he made the machines described in the answer; and the only remaining question is, whether in point of fact the machines so made constitute an infringement of the complainants' patent, as alleged in the bill of complaint. That question was submitted to the jury, under carefully prepared instructions, on the trial of the issues of fact, and they found that the machines so made by the respondent do infringe the first claim embraced in the specification annexed to the reissued letters-patent. No new evidence has been introduced on that point, and we do not think it necessary to review that finding of the jury. But the jury also found that the machines so made by the respondent did not infringe the second and third claims of the patent; and in that finding we do not concur. On the contrary, we reject that part of the finding of the jury, and hold that the machines so made by the respondent infringe the second and third claims of the patent as well as the first; but we do not deem it necessary again to analyze the testimony upon the point, because, in our judgment, the conclusion formed is the proper and necessary result of the finding of the jury in relation to the first claim of the patent. It follows, therefore, that the complainants are entitled to an injunction, and to an account, as

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prayed in the bill of complaint. Unless the parties agree as to the amount of the damages, the cause must be referred to a master to ascertain the amount, or if both parties desire it, the amount may be ascertained by the court. Let the decree be prepared accordingly.

MASSACHUSETTS DISTRICT.

MAY TERM, 1861.

E. W. CARPENTER, Libellant, v. THE SCHOONER EMMA
JOHNSON.

Admiralty has jurisdiction over a contract of affreightment between two ports in the same State, where, from the usual course of the voyage, a part of the navigation of the vessel is upon the high seas, and out of the jurisdiction of any particular State.

ADMIRALTY appeal from a decree in a proceeding *in rem* against the schooner Emma Johnson, which was engaged in the transportation of goods between Boston and Chatham. The master undertook to carry a piano from Boston to Chatham, and deliver it there to libellant. The piano was injured on the passage, and the suit was instituted to recover damages therefor. The District Court gave a decree in favor of the libellant.

When the case came up to this court, the pleadings were amended, on the part of the libellant, setting forth that the schooner, at the time the contract was made, was lying at the port of Boston within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the court; was bound over the high seas to the port of Chatham; and that the master undertook to transport the piano in the usual course of the vessel to that port. The answer alleged that the contract was for the transportation of the piano from Boston, in Massachusetts, to

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Chatham, in the same State, and was made and to be executed within the State, and so was not a contract within the admiralty and maritime jurisdiction of the court.

H. A. Scudder, proctor for libellant.

The jurisdiction of the admiralty in tort depends upon the *locus*; in contract, upon the subject-matter. 2 Brown's Adm. 88, 90, 91, 110; *Thackarey v. The Farmer*, 1 Gilp. 524; *Menetone v. Gibbons*, 3 T. R. 268.

If the contract be maritime, or to be performed upon the tide-waters, it is within the admiralty jurisdiction. *Peroux v. Howard*, 7 Pet. 324; *Steamboat Orleans*, 11 Pet. 175; *De Lovio v. Boit*, 2 Gal. 449, 471; *The Draco*, 2 Sumn. 157; 2 Parsons, Mar. Law, 511.

A contract of affreightment, like any other contract for service upon the sea, is a maritime contract, and within the jurisdiction of the admiralty. 2 Brown's Adm. 86; *The Spartan*, Ware, 145; *The Rebecca*, Ware, 187; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 392; Flanders on Ship. 290.

A merchant shipping freight or merchandise has a maritime lien upon the ship for any damage arising from the fault or neglect of the master, or the insufficiency of the vessel, which lien is a subject of admiralty jurisdiction. *Wells v. Osmond*, 6 Mod. 238; 2 Brown's Adm. 86, 88, 98; *Menetone v. Gibbons*, 3 T. R. 296; *The Volunteer*, 1 Sumn. 551; *The Rebecca*, Ware, 187; *The Spartan*, Ware, 145; 1 Parsons, Mar. Law, 452; Benedict's Adm. 154, 203; Conkling's Adm. 56; Abbott on Ship. 126.

The ancient admiralty jurisdiction, as exercised in England and in the continental courts of Europe, embraced this case. *Exton*, 321; *Wells v. Osmond*, 6 Mod. 238; 2 Brown's Adm. 86, 88; *De Lovio v. Boit*, 2 Gal. 401, 404, 405, 427, 429, 439, 443, 446, 449, 450, 451, 465, 466, 467; Benedict's Adm. 46 *et seq.*

It was within the admiralty jurisdiction of the several States before and after the Declaration of Independence, and before the adoption of the Federal Constitution. *Talbot v. Commander of Three Brigs*, 1 Dall. 103; Benedict's Adm. § 118 *et seq.*, 161,

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165, 166 ; Curtis, Rights of Mer. Seamen, 348, 352, 372 ; *De Lovio v. Boit*, 2 Gal. 470, 471, note ; *Steamboat Magnolia*, 20 How. 298.

Under the Constitution and laws of the United States, and the decisions of our judicial tribunals, this case is within the admiralty and maritime jurisdiction of our Federal courts. Const. of the U. S. art. 3, § 2 ; Benedict's Adm. 286, 287, 288 ; *The Volunteer*, 1 Sumn. 551 ; *Steamboat Orleans*, 11 Pet. 175 ; *The Thomas Jefferson*, 10 Wheat. 428 ; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 344, 392 ; *De Lovio v. Boit*, 2 Gall. 468, 474, 476 ; *Derry v. Hersey*, 21 Law Rep. 473 ; 1 Stat. at Large, 77.

The several States having parted with all their admiralty and maritime jurisdiction under the Constitution of the United States, and having yielded the same to the Federal courts, if they have no remedy here, they are barred from their original rights. *Steamboat Magnolia*, 20 How. 296 ; Const. of the U. S. ; 1 Stat. at Large, 77.

The cases cited and relied upon by the respondents do not touch the case before the court. *Gibbons v. Ogden*, 9 Wheat. 194, was not a question of admiralty jurisdiction, but of the power of Congress to regulate commerce. *The Genesee Chief*, 12 How. 443, and *Nelson v. Leland*, 22 How. 55, simply assert the admiralty jurisdiction over the Western lakes and rivers ; thus claiming an extension, and not a limitation of the jurisdiction of the admiralty, as before understood. See Flanders on Ship. p. 316. *Allen v. Newberry*, 21 How. 244, is a mere judicial consideration and construction of the United States statute of 1845, deciding that said statute limits the admiralty jurisdiction upon the Western lakes and rivers to commerce between ports in different States. *McGuire v. Card*, 21 How. 248, was a suit *in rem* against a domestic ship for supplies, and, aside from the legal defence which existed, was decided upon the authority of *Allen v. Newberry*, and upon the same principle.

The above cases simply assert that the act of 1845 is valid, and that by it admiralty jurisdiction on the Western lakes and rivers is limited to commerce between ports in different States,

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and does not touch the jurisdiction of the admiralty upon the tide-water.

C. T. and T. H. Russel, proctors for claimants.

The contract alleged in this case is that the respondents undertook as common carriers to safely carry a piano from Boston, Massachusetts, to Chatham, in the same State. This is a question arising under the internal commerce of Massachusetts, and is not a subject of the admiralty jurisdiction of this court. It is not alleged that the contract was by charter-party or bill of lading, but that respondents were common carriers between these two places in the same State. *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 392; *Allen et al. v. Newberry et al.*, 21 How. 244; *Jackson v. Steamboat Magnolia*, 20 How. 302; *McGuire v. Card*, 21 How. 248; 2 Parsons, Mar. Law, 500, 502, 504, 510, 642.

The contracts between citizens of a State are left to the tribunals of the State, excepting only specified cases. The mere fact of the vessel passing over a part of the high seas, for a short period, did not add anything of a foreign, external, or maritime character to the contract. *The Genesee Chief*, 12 How. 443.

CLIFFORD, J. It is conceded that the usual course of the schooner during a part of her voyage was upon and over the high seas, as alleged in the amended libel, and that she pursued her usual course during the trip when the damage complained of in this case occurred to the piano. But it is insisted by the counsel of the respondents that the question of jurisdiction is unaffected by the fact that the entire navigation of the vessel was not within the waters of the State; that if the contract was made in the State, and the voyage was from a port of the State to another port in the same State, then the question of liability is one arising under the internal commerce of the State, and is not a subject of admiralty jurisdiction. On the part of the libellant the whole of this doctrine is denied, and he insists that admiralty jurisdiction in matters of contract depends entirely upon the subject-matter; that if the contract be maritime, or to be performed upon tide-waters, it is within the admiralty jurisdiction; and that a contract of affreightment, like any other con-

tract for service upon the sea, is a maritime contract, and consequently a suit for the breach of it is within the admiralty jurisdiction. Much must depend in jurisdictional questions upon the decisions of the Supreme Court; and it may not be amiss to remark that, where the point has been definitively settled by that tribunal, it is the duty of this court to conform its action to their ruling as the established law. Two cases are cited by the counsel of the respondents, and chiefly relied on as showing the want of jurisdiction in this case. *Allen et al. v. Newberry et al.*, 21 How. 244; *McGuire v. Card*, 21 How. 248. Referring to the pleadings in the case first cited, it will be seen that the goods in question were shipped on board the vessel at the port of Two Rivers, in the State of Wisconsin, to be delivered at Milwaukee, in the same State, and the court decided that the act of Congress of the 26th of February, 1845, confines the admiralty jurisdiction of the Federal courts upon the lakes to matters of contract and tort arising in, upon, or concerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes. It does not extend, therefore, say the court, to a case where there was a shipment of goods from a port in a State to another port in the same State. But it should be observed that the rule laid down is one deduced from the previous proposition, that the act of Congress had thus confined the admiralty jurisdiction as to controversies arising upon the lakes. Congress cannot create admiralty jurisdiction, because that jurisdiction is expressly granted to the Federal government by the Constitution of the United States; but I suppose it to be an admitted doctrine that Congress may limit, or even control its exercise, by modifying or repealing existing laws, and enacting others in their place. Such jurisdiction cannot be exercised, except by courts duly constituted, and it is undoubtedly within the competency of Congress to confer the power to exercise the jurisdiction upon such courts as it may see fit to establish. Exercising this right, Congress has limited the jurisdiction of the Federal courts, in controversies growing out of commercial transactions upon the lakes, to matters of contract and tort, arising in, upon, or con-

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cerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories bordering on those waters; but that act has no relation whatever to admiralty jurisdiction upon the high seas, or in the bays, harbors, and arms of the sea on the Atlantic coast. Dismissing that case, therefore, as one not applicable to the question before the court, I will proceed to a brief examination of the one last cited. It was a suit *in rem* against a steamer to recover the balance for coal furnished the steamer while lying in the port of Sacramento. She was engaged in the business of navigation and trade in the Sacramento River exclusively, within the State of California, and of course between ports and places of the same State. Granting, for the sake of the argument, that the rule laid down in that case is applicable to the harbors, bays, and arms of the sea, still I am of the opinion that it is not an authority for the proposition maintained by the respondents, as applied to the present case, for the reason stated in the opinion of the court, that the steamer was engaged in the business of navigation and trade on the Sacramento River exclusively, within the State of California. It was a suit for supplies, to enable the steamer to navigate the purely internal waters of the State. Even supposing the rule laid down in that case was intended to be applied to the harbors, bays, and arms of the sea on the Atlantic coast, still, I must hold, until the point is otherwise decided by the Supreme Court, that the decision in that case has no application to a contract of affreightment, where, from the usual course of the voyage, a part of the navigation of the vessel is upon the high seas, and out of the jurisdiction of any particular State; and such, I think, must have been the views of Mr. Justice Nelson, as expressed in the case of *Moore v. The American Transportation Co.*, 24 How. 39, when he said it was the purely internal commerce and navigation of a State that is exclusively under State regulations. Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same State, when any part of the voyage is upon the high seas, for every navigator knows that in many

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such cases nearly the whole voyage is out of the limits of any State; and if parties, under such circumstances, can have no remedy in the admiralty courts, it is difficult to see to what tribunals they can resort for the redress of their grievances. Without pursuing the subject at this time, suffice it to say that I am clearly of the opinion that the plea to the jurisdiction of the court cannot be sustained.

APPENDIX.

NOTICE OF THE DEATH OF HON. RUFUS CHOATE.

CIRCUIT COURT, MASSACHUSETTS DISTRICT, OCTOBER TERM, 1859.

Justice CLIFFORD, and Judge SPRAGUE sitting with him.

THE announcement of the decease of the Hon. Rufus Choate was made to the court by C. L. Woodbury, Esq., United States Attorney for Massachusetts, at Boston, on the morning of the 15th of October.

Mr. Woodbury presented the resolutions of the bar of this court, together with those adopted in the Supreme Judicial Court of the State, and moved that the court order both to be spread upon the records.

This motion the Attorney accompanied by the following remarks : —

May it please your Honors : — Since your Honors last met upon the bench of this court, a heavy sorrow has fallen upon its bar. One who, by seniority and service and fame, may well have been called our leader, has gone from our ranks forever.

I have been requested to present to this court the resolves of the bar of Suffolk and of this court, expressive of their respect for the deceased, and their grief at his loss, and to ask that they be spread upon the records.

It is not for me to pronounce the eulogy of this illustrious man. To one who has mingled side by side with him through life's drama, from the commencement to the close of his career, to one well fitted, this task of love has been assigned. But

here, in the forum he loved so well, — here, amidst those in the contest with whom he gained his well-earned fame as a jurist and an advocate, — I may be pardoned for a few words concerning him who has passed from amongst the honest, fearless, and able advocates of this bar, with a reputation for genius and humanity that will be called undying.

His predilection for the bar was not an enforced one. Honored by the people's confidence, and the choice of this Commonwealth, he spent several years in each branch of Congress, performing the duties of a legislator with marked ability and constantly increasing reputation ; but on the first favorable occasion he returned to the bar, there to remain through the rest of his career, steadfastly resisting numerous efforts to win him back to active public life.

To this bar, that he loved so well, and to his profession, his whole life was a useful and brilliant example. The untiring industry with which he prepared his causes for trial, the patience with which he tried, and the zeal with which he threw the whole powers of his great intellect and strong feelings upon his client's side, were unsurpassed.

More than this, there was that in Mr. Choate which drew to him the affection of those who came in contact with him to a remarkable extent. I do not speak of his relations with the seniors at the bar, — they have borne their testimony. It was as a young stranger at this bar that I first made his acquaintance, and it is of his conduct to the juniors that I would speak. His heart warmed towards young men, his advice was always at their service, he encouraged them with words of kindness, and was always willing, by a suggestion or a few words of explanation, to set the inexperienced junior who asked it on the right track for the proper framing of his issue or selection of his law points. No man who rose from youth to middle age at this bar can say that he ever experienced unkindness or hauteur from Mr. Choate in the court-room or the council chamber ; I may be wrong, but I deem this kindness and courtesy, native and unaffected as it was, to be a proud trait in the character of one whose fame lived in all men's mouths, whose time was precious as gold, and whose health was continually racked by the herculean

tasks his energetic and untiring soul imposed on his frail frame.

I cannot describe the genius of the illustrious dead, that power which he had of touching the deepest feelings of the soul, of rousing every chord of human sympathy, of blending harmoniously the severest logic, the soundest argument, and the most penetrating appeals. In this, neither Wirt nor Pinckney, neither Erskine nor Grattan, ever surpassed him. Criticism has yet to determine whether they equalled him.

Nature had cast him in too noble a mould for small vices. Though his wit was keen and playful, it was never malevolent: he used it not as a weapon of attack. His heart was a stranger to envy, and his lips to detraction. His speeches were models of courtesy towards dead political opponents as well as to living ones. It is well for us of the North that his fame is not local; it has gone abroad through this Union, — it has gone to our mother country, — it has spread where the English tongue is spoken. It had been reproached to New England that the imagination of her sons was as cold as her climate; that their genius was of the head, not of the heart.

The records of his oratory, blazing with the evidence of his gorgeous and copious imagination, and the universal testimony of the sway his eloquence had, will go far to set that calumny at rest. If men on juries and in popular assemblies felt their human sympathies warm when his generous heart excited them, colder judges felt the influence of his great reasoning powers, and paid to his logic a like deference that juries gave to his passion. How often has a wretch whom thoughtless passions have driven to the bar of justice learned from his advocate's plea that there were still broad sympathies which united humanity to him, and that he was not lost to hope.

From among the almost countless examples of the pure and deep feelings of his heart, may I be permitted here to recall those noble words of patriotism and love which burst from his lips in an hour of trial, and still glow in the hearts of his countrymen. They were his rule in life, and in death constitute his best epitaph, — "Join no party that does not carry the flag and keep step to the music of the Union."

'After which Hon. Caleb Cushing addressed the court as follows : —

May it please your Honors : — Mr. Attorney has accompanied the resolutions of the bar, in commemoration of Mr. Choate, with remarks so just and appropriate as to make it superfluous, perhaps, for others to speak. I desire, however, to make two or three reflections of special application to the nature of the legal questions frequently discussed before this court.

In comparing the state of the legal profession in this country and in others, and especially in our mother country, we perceive a material difference in the study and practice, and consequently in the mental character, of eminent lawyers. In England the professional practice is more or less subdivided, as to courts, as to departments of business and as to branches of the law, so that individuals rise to distinction, some as attorneys and some as counsellors, some in equity, and others in common, in admiralty, or in ecclesiastical law. Thus, a tendency exists there to narrowness of study, so as to have half justified the remark of Lord Tenterden, that legal discussion was degenerating into the search of distinctions rather than principles, and to have occasioned, if not to have justified, the opinion that lawyers are unfit for the higher and larger debates of Parliament. Here, on the contrary, the system of legal practice requires of eminent counsel to be alike conversant with all the various branches of practice and of law, thus producing a more comprehensive state of mind, which is apparent, I think, in the greater tendency to generalization and the more eclectic quality of the legal mind in the United States. Here jurisprudence is indeed pre-eminently a science, embracing all social interests, and rising from ordinary municipal questions to those of legislation and government, and preparing the erudite jurispudent for the larger functions and duties of the statesman.

But the business of this court, the questions with which it is conversant, and the duties here of counsel of the professional rank of Mr. Choate, are most of all such as to lift the legal mind into the very highest and broadest regions of the science and practice of the law. We have to deal in the courts of the

United States, as distinguished from those of the States, with all the possible questions of municipal law, under those heads of Federal jurisdiction which confer on the Federal courts authority concurrent with, or in supervision of, those of the several States. We have to maintain and to reconcile the complicated relations of the two systems of government and of law, and the conflicts of double allegiance which we owe to the Union as its citizens or subjects, and to one State as its citizens or subjects. In a word, we — your Honors, as the authoritative determiners of the law, and we at this bar who, not equally, but yet in common with, your Honors, are also the ministers of justice — have to discuss and decide here, not only the ordinary municipal, but the largest international questions, and to judge the rights and the duties of sovereignties as well as of individuals, to wit, the public and private international rights and duties of the sovereignties of the Union and of the several States.

This consideration may serve to illustrate the fallacy of one of the current superficialities of the day, which denies to the Federal courts all authority in political questions. When the courts of the United States have sovereign States before them directly or indirectly, when they adjudge private rights determinable only by critical examination of constitutional power of sovereign States, they do indeed, and of necessity, pass on political questions. Were not political questions, namely, the legislative power of a sovereign State in conflict with a Federal treaty, involved in the case of *Fairfax v. Hunter*? Was not the question in *Luther v. Borden*, which of the two conflicting political organizations was really and truly the State of Rhode Island, — was not that a political question? Was it not so in *Cross v. Harrison*, when the Federal courts had to consider at what time and in what form government began to exist in the State of California?

They strangely err who so loosely assert that questions of public and sovereign right do not belong to the science of jurisprudence as administered by your Honors. The error is in mistaking words for things, as may be seen in many a case, such as that of *Clark v. Broder*, in which the limits of judgment as between questions which are of political as distinguished from

legal result are plainly designated by the wise and learned men in whom is reposed, not the higher, but the highest law of the United States.

Here, then, Mr. Choate occupied a place congenial to his temper, to his talents, to his condition, and to his political experience. No loftier professional sphere ever existed, none was ever more nobly filled, than this of Mr. Choate in the courts of the United States. Whether in the discussion of the mere legal aspects of a case for the consideration of the court; whether in the application of the law to the facts before him for the instruction of the jury; whether in the exercise of his transcendent facility and force of dialectic power; whether in the utterance of those magnificent expressions of thought of his, now quintessenced in sentences terse and compact as Tacitus, now in sentences, as Grattan said of the speech of Fox, rolling out like voluminous waves of the Atlantic, three thousand miles long,—in all this, Mr. Choate was emphatically in his place in this court, admirably discharging his duty to his clients as a lawyer, while reconciling as a statesman his duties to the Union with those to his native Commonwealth.

At the conclusion of Mr. Cushing's remarks, Mr. Justice Clifford spoke as follows:—

I heartily concur with my brethren of the bar in their testimony of respect to the memory of Mr. Choate, and shall cheerfully comply with their request to have the resolutions which they have adopted placed among the records of this court. To recognize the services of a great and distinguished man, after all that was mortal of him has passed away, is a duty which we owe alike to the dead and the living,—a duty of justice and gratitude to the former, of instruction and encouragement to the latter. When the bronze statue of Mr. Webster was welcomed to its pedestal in this city a few weeks ago, amidst so many eloquent voices of affection and eulogy, it was intended to be, and it is hoped will long continue to be, not only an enduring memorial of the past, but a pledge, also, of the future; not only an expression of contemporary regard and admiration, but a record, at the same time, of a bright and influential example;

not only a commemoration of greatness in one who has passed away never to return, but if possible, also, an inspirer of greatness in many, if not all, who may gaze upon the majestic representation for generations yet to come. It is in this sense we would cherish and preserve the memory of Mr. Choate, and desire to have the recollections of his professional fame transmitted to later times. Residing in another State, it was not my fortune to have that intimate association with him which was enjoyed by his more immediate friends; still, I knew him well enough to appreciate those rare and estimable qualities of mind and heart which secured the friendship and confidence of all around him, and to be deeply and thoroughly impressed with the justice of his professional fame. Of his private virtues I may well forbear to speak, as the high estimate which was placed upon his character has been abundantly shown by those who had the best opportunities to witness the sincerity and purity of his motives, and the integrity and uprightness of his conduct, in all that pertains to the intercourse of professional and private life. All these characteristics have been so faithfully, and, as I believe, so justly portrayed by those who knew him best, and whose opinions are entitled to the fullest credence, that but little remains to be done on the present occasion, except to join in the general regret and sorrow which have been many times earnestly expressed at the loss of a member of this bar so distinguished and esteemed in all the relations of human life. Mr. Choate had been on several occasions in the public service. More than thirty years ago he had served his native State in both branches of its legislature. In 1832 he was elected a representative in Congress from his native district, and subsequently he followed Mr. Webster to the Senate, as he has followed him now to the grave. Occasionally he felt called upon by a sense of duty to address his fellow-citizens upon the state of public affairs, and thus to demonstrate that he was not an inattentive or indifferent observer of what concerned his country. While in these positions and addresses he was certainly distinguished by that peculiar eloquence, both of language and of thought, which always belonged to him, yet it was not in public or political life that he reaped his highest and most enduring honors. His highest eminence and his

widest reputation were acquired in the practice of his profession, and his chief fame must rest upon his forensic displays in the tribunals of justice ; and it is as a great lawyer and an eloquent advocate that, in this place at least, we most appropriately remember him. In full practice for nearly thirty years, and during half or more of that time occupying a foremost place at the Boston bar, his career was almost equally remarkable for its laboriousness and its success. In accounting for this success, there is a disposition sometimes manifested to overlook that very feature of his professional character which, perhaps, more than any other, contributed to its accomplishment. Whatever others may think, that which has most struck me in the mental efforts of Mr. Choate is not his exuberant rhetoric, his glowing style, or his vigorous logic, but that extensive erudition and legal learning by which all his brilliancy and oratory were sustained, and which could only have been the fruit of persevering industry. In this respect, by the younger members of the profession at least, his example well deserves to be held in constant recollection. It is another admonition added to a multitude of a similar character which have gone before it, that, to be an eminent lawyer, it is necessary to be a student. With all his acknowledged genius, his warmth of fancy, his command of rhetoric, his quickness of perception, his power of logic, Mr. Choate felt himself forced, nevertheless, to make his way upward to his professional fame by close study and assiduous toil. It is said, indeed, that he became so wedded to his books as to seek in them at once his instruction and his relaxation, so that after being worn down by a trial in court he would solace himself at home by an hour with Shakespeare or a conversation with Plato. But for this solace he has himself told us, in that beautiful tribute to the value of books which is doubtless fresh in all your memories, he would at times have hardly known how to still his throbbing brain, or how to keep the balance of his excited mind. Better for him, perhaps, and better for all of us, since his life might have been prolonged, if his relaxation had sometimes been differently chosen, and if he had given a portion of that time to the refreshment and renewal of his physical energies, nearly the whole of which he lavished upon the culture of his mind. But although

he did not live to be old, he lived long enough to achieve an honorable and, I trust, an enduring fame, and to leave behind him a cherished memory and a bright and instructive example. In these we may all of us find a consolation and an encouragement, and his nearer and more intimate friends will profit also by the recollection of those social attractions, which, though they form for them the most delightful part of his character, do not yet belong so emphatically to the public estimate of his loss. All his hopes and his fears, his perplexities and toil, have now ceased, but the remembrance of his success, and of his well-earned position as the leader of the Boston bar, remains to encourage those who come after him in the profession of his choice to follow in his footsteps and emulate his example. That encouragement, I repeat, addresses itself most forcibly to the younger members of the profession ; and it may not be amiss to admonish them, that whoever may aspire in future years to occupy the place now made vacant by death must not expect to realize the fruition of their hopes through any other instrumentalities than those so unremittingly employed by the subject of these remarks from the time he was first admitted to the bar to the close of his brilliant and successful professional career.

Judge Sprague also replied, and expressed his entire approval of the motions.

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ACQUIESCENCE.

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ADMIRALTY.

Whether a suit claiming damages for the non-fulfilment of a charter-party, on account of a refusal to furnish a specified cargo, can be sustained in admiralty, or whether the party must resort to his personal action for damages as in other cases, *quære*. *Rich v. Parrott et al.*, 55.

AFFREIGHTMENT, CONTRACT OF.

See DELIVERY, 2, 3 ; JURISDICTION, 8.

AGENT.

1. Where a cashier of a bank took a note running to him as “cashier,” without specifying of what bank, *held*, that evidence was admissible to show that, in taking the note, the cashier was acting as agent of a certain bank. *Bank of Newbury v. Baldwin*, 519.
2. Between the original parties to a bill or note the general rule appears to be, that the facts are open to inquiry ; and that an agent is not liable to be sued upon contracts made by him in behalf of his principal, if the name of the principal is disclosed to the person contracted with at the time of entering into the contract. *Ibid*.
3. Where on the face of the note the person to whom it was given was designated “cashier,” and it was furthermore agreed in the case that such person was in fact cashier of Newbury Bank, *held*, that the case must be viewed as if the words “cashier of Newbury Bank” had been written on the note. *Ibid*.

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Where an interest in real estate is devised to an alien, he will be entitled to hold the same until the State shall interpose its prerogative claim. *Cross v. De Valle*, 282.

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AMENDMENT.

Under the act of Congress, August 19, 1841, limiting suits by or against assignees of bankrupts to two years after the cause of action accrued, a bill filed after two years cannot be regarded as an amendment to one for the same cause of action, filed before the expiration of the two years, but dismissed by the court. *Clark v. Hackett*, 269.

ANSWER.

1. If the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive, unless disproved by something more than the testimony of one witness. *Delano v. Winsor et al.*, 501.
2. Where the complainant sought to recover damages of the respondents, because they improperly and unfaithfully executed the trust he confided to them, and the facts charged in the bill were clearly and positively denied in the answer, *held*, that inasmuch as the complainant failed to prove the facts charged by more than one witness, he had not overcome the denials of the answer. *Ibid*.

APPRAISAL.

1. Where sugar imported into the United States is appraised by samples which were drawn from the packages by the person called the sampler, and were delivered by him to the local appraisers, and the examination was made by them without having seen the packages, *held*, in the absence of any objection by the importers as to the manner of drawing the samples, or to their identification, that it was a substantial compliance with the requirements of the act of Congress authorizing the appraisal in such a case to be made by samples. *Yznaga et al. v. Peaslee*, 493.
2. And where, upon appeal to merchant appraisers, the samples were, after the decision of the local appraisers, placed in the depository in the appraisers' department, and were there kept until the meeting of the merchant appraisers, and were then produced by one of the local appraisers, and no objection as to the identity of the samples being then made by the importers, *held*, that all objections which might have been taken at the appeal were waived by the importers. *Ibid*.
3. If the samples are fairly selected from one in ten of the packages, and are fully identified, it is of no importance whether they were drawn from the packages by the appraisers themselves or by the official sampler of the appraisers' department. *Ibid*.

See DUTIES, 1, 2.

AVERAGE, GENERAL.

Where masts and spars are cut away in a storm, and, in falling, injure the deck of a vessel, or destroy rails and bulwarks, the repairs of such damage belong to general average; and it is well settled by the Supreme Court, that the voluntary stranding of a vessel, when required and designed for the common safety of the associated interests, constitutes a case for general contribution, even though it be followed by her total loss, provided the cargo is thereby saved. *Patten v. Darling*, 254.

AWARDS.

Awards are to be liberally construed, because they are made by judges of the parties' own choosing; but they must decide the whole matter submitted to the referees, and they must be certain, final, and conclusive of the whole matter referred. *James and Wife v. Thurston*, 367.

BAR.

See SALVAGE, 14; EQUITY, 1.

BILL IN EQUITY.

Where fraud is charged in the bill, and positively denied in the answer, a decree cannot be pronounced for the complainant on the testimony of a single witness, without some corroboration either from the testimony of other witnesses, or from the circumstances proved in the case. *Clark v. Hackett*, 269.

See ANSWER, 1, 2.

BOTTOMRY.

1. *Semble*. Although the assignee of a bottomry bond may maintain a suit in admiralty in his own name, yet he may also sue in the name of his assignor. *Burke v. Brig M. P. Rich*, 308.
2. *Held*, that a suit brought in the name of the assignor will be maintained where the real parties in interest appeared in the progress of the suit and filed a supplemental libel, which was answered by the respondent, and then the parties proceeded to issue and trial. *Ibid*.
3. There must be a twofold necessity for raising money to justify a master in raising it on bottomry; there must be a necessity of obtaining repairs or supplies, in order to prosecute the voyage; and there must be a necessity of resorting to this method to obtain the money, from inability to procure the required funds in any other way. *Ibid*.
4. Hypothecation of the vessel can only be made in a foreign port; but in the jurisprudence of the United States all maritime ports, other than those of the State where the vessel belongs, are foreign to the vessel. *Ibid*.
5. Although it is true that proceedings on a bottomry bond must be instituted within a reasonable time, yet the maritime law will not suffer the lien to be affected by the mere departure of the vessel from the return port, with or without the knowledge of the holder of the bond. *Ibid*.

6. Where an assignee of a bottomry bond took a mortgage of the vessel on which the bond was given, to secure money loaned, but it did not appear that any of the money was included in the mortgage for the payment of the bond, *held*, that his rights were not affected. *Ibid*.

BURDEN OF PROOF.

See COLLISION, 12, 13.

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See INSURANCE, 4 – 7.

CARRIER.

See NOTICE, 1.

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CHARTER-PARTY.

1. Where in a charter-party it was covenanted that the charterers should furnish the vessel at Calcutta with a full cargo, and, among other articles of freight, “sufficient saltpetre or its equivalent for ballast,” *held*, that ballast-paying freight was the object of the latter proviso, and that, in order to constitute a compliance with the charter-party, the goods must be of the description of *heavy goods* usually purchased for exportation at Calcutta; should be suitable and proper for ballasting the ship named in the contract, having reference to the intended voyage and stipulated cargo. *Rich v. Parrott et al.*, 55.
2. By the terms of a charter-party, the owners engaged that the vessel during the voyage should be kept seaworthy, and should be furnished with necessary men and provisions, and that the whole of the vessel under the deck, with the exception of the cabin, accommodations for the men, and storage of sails and provisions, should be at the sole use and disposal of the charterers during the voyage. *Held*, that the instrument was a contract of affreightment, and not a demise of the vessel. *Donahoe v. Kettell et al.*, 135.
3. When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, he becomes the carrier of the goods shipped on board; and in case the vessel is employed by him as a general ship for the conveyance of merchandise, the master is his servant while procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the owners of the vessel; and the latter, consequently, cannot be made responsible for the loss of the goods shipped on board, or for injury to the same under such contracts. But when the charter-party operates merely as a contract between the charterer and the ship-owner for the conveyance, by the latter, of goods and merchandise to be shipped on board by the charterer, the owners of the vessel are the carriers of the goods, and will in general be responsible to the charterer for the non-conveyance of them, according to their contract. *Ibid*.

4. In its nature the contract for conveyance of merchandise for a round sum is an entire contract, and unless it be completely performed by the delivery of all the goods at the place of destination, the carrier will in general derive no benefit from the time and labor expended in the partial performance; but if the owner of the cargo is the cause of its not being transported to the port of destination, full freight may be recovered. *Hart v. Shaw*, 358.

See CONSTRUCTION, 3 - 5.

CLAIM.

See PATENT, 6, 8 - 10.

CODFISH.

See FISHING VESSEL, 2, 3.

COLLISION.

1. Steamers having more power and speed than sailing vessels, and being more immediately subject to control, greater caution and vigilance are expected of those in charge of them to avoid collisions. *Baker et als. v. Steamship City of New York*, 75.
2. When a steamer and sailing vessel are approaching each other, the sailing vessel has, in general, a right to hold her course, and it is the duty of the steamer under such circumstances to adopt the necessary precautions to avoid a collision. *Ibid.*
3. The steamer is *prima facie* chargeable if she fails in this, and a collision occurs. *Ibid.*
4. If the sailing vessel fails to keep her course, the fault will in general be attributable to her, provided it appears that under the unexpected change of course by the sailing vessel the steamer used all reasonable exertions to avoid the danger. *Ibid.*
5. These rules, however, cannot have any controlling application before the two vessels have approached to a point of danger which renders their observance reasonably necessary. *Ibid.*
6. No maritime usage requires merchant vessels constantly to carry lights. *Ibid.*
7. *Semble.* If the absence of a light contributed to a collision in a harbor, or crowded thoroughfare, on a dark night, and one vessel showed a light and the other did not, it might well be held that the dark vessel, other things being equal, was in fault. *Ibid.*
8. When a steamer and sailing vessel are approaching each other, and the sailing vessel is put on a new course, she is bound to keep it, and it is the duty of the steamer to keep out of the way. *Wakefield v. Steamer Governor*, 93.
9. In the daytime, in good weather, in a place where there is no want of sea-room, and no obstructions to the navigation, the sailing vessel must hold her course, and the steamer must adopt the necessary precautions to avoid a collision. *Ibid.*
10. Precautions must be seasonable in order to be effectual, and if not so, and

a collision ensues in consequence of the delay, it is no defence to say that the necessity of precautionary measures was not perceived until it was too late to render them availing. *Ibid.*

11. It is the duty of the sailing vessel to keep her course ; and if she fails to do it, and a collision ensues, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of course and the other circumstances of the case. *Pope v. Steamboat R. B. Forbes*, 331.
12. When a vessel shown to have been properly moored in a proper place is run into by a steamer crossing a harbor, the burden is on the steamer to show either that she was without fault, or that the disaster was the result of fault on the part of the moored vessel. *Amoskeag Manufacturing Co. v. Steam Ferry-Boat John Adams*, 404.
13. Inevitable accident under such circumstances cannot be presumed, especially when the occurrence was in the daytime ; but it must be clearly proved by the party setting it up, unless the fact appears from the testimony on the other side. *Ibid.*
14. In case of a collision between a moving steamer and a vessel moored at a wharf, in which the latter was injured, it is no defence to say that the damage would have been less if the vessel had been more strongly built. *Ibid.*

See FERRY-BOAT, 1 ; WATCH, 1 ; NEGLIGENCE, 1 ; PILOT, 1 - 4.

COMBINATION.

See PATENT, 8 - 10.

CONDITIONS.

See CONSTRUCTION, 9, 10.

CONFESSIONS.

1. Whether the accused, in making confessions before the finding of the indictment, believed themselves to be speaking under oath or not, is a question of fact for the jury. *United States v. Williams and Cox*, 5.
2. When not made under oath, confessions of the accused are admissible in evidence, although the proof that the crime has been committed is not, independent of the confessions, plenary. *Ibid.*

CONSTRUCTION.

1. Words are to be construed according to their primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense ; or unless in their primary signification they are incapable of being carried into effect ; in which latter case the first rule is the intention of the parties, to be collected from the words of the instrument and its subject-matter. *Rich v. Parrott et al.*, 55.
2. Where the language of a contract is plain and clear, it must be understood that the parties mean what they have plainly expressed ; but if, from a view

of the whole instrument, the evident intention of the parties is different from the literal import of the terms employed to express their intention in a particular part of the instrument, that intention should prevail, notwithstanding it should appear to be inconsistent with such particular part, because the construction of the contract ought not to depend upon any formal arrangement of words, but should be collected from every part of the same as applied to the subject-matter to which it relates. *Donahoe v. Kettell*, 135.

3. In this case the vessel was chartered for a voyage from Boston to Port au Prince, and back to Boston, — the charterer agreeing to pay a round sum for the voyage, all foreign port charges, pilotage, and lighterage, and to advance at the outward port only what the master might require for the disbursements of the vessel, not to exceed one half the charter. These advances having been made, and the voyage not completed, no proportionate part of the charter money was due the owners, or could be received by them from the charterers. *Ibid.*
4. Whenever the language of a contract is ambiguous, the intention of the parties is the primary rule of construction; and in order to understand the sense in which language was employed, it is necessary to examine attending circumstances, and weigh terms in connection with the subject-matter to which they were applied. *Hart v. Shaw*, 358.
5. In this case, a guaranty of eight feet of water "at the place of loading" was construed to mean eight feet, or at least a sufficient depth to enable the vessel to perform her voyage at the place of loading and thence to the open sea. *Ibid.*
6. When the interpretation of the revenue laws and regulations is invoked, considerable weight should be given to the practice of the government as a contemporaneous construction of the provisions under consideration. *Clark v. Peaslee*, 545.
7. A guardian petitioned the legislature for leave to sell a portion of the minor's estate to a town "to erect a pest-house upon." Leave was granted by special act to sell the land "for the said purpose," and to invest the proceeds for the benefit of the minors; and the act, moreover, provided that the deed should "vest in the purchaser all the right, title, and interest" that the parent of the minors had in the estate. *Held*, that the guardian was authorized by the act of the legislature to sell all the right, title, and interest in the property which the parent of his wards in his lifetime possessed, and to make and execute a sufficient deed for that purpose. *Ward and Wife v. N. E. Screw Co.*, 565.
8. Pursuant to that license a conveyance of the land was made to the town treasurer or his successors in office forever, "to erect a pest-house upon," to enjoy "in the manner aforesaid," "discharged from all manner of encumbrances," and in the granting clause it purported to be an absolute and full conveyance of the land, without condition. *Held*, that the words "to erect a pest-house upon" were merely descriptive of the use to which the town intended to put the land, at the time of purchase, and were not intended as a condition in the grant, or a limitation of the estate conveyed. *Ibid.*

9. Whether conditions in a conveyance be precedent or subsequent, as there are no technical words to distinguish them, is a matter of construction, and depends upon the intention of the party creating the estate. *Ibid.*
10. Conditions subsequent are not favored in law, and must be strictly construed. *Ibid.*
11. The habendum of a deed was as follows: "To have and to hold the said bargained and granted premises with all the privileges and appurtenances thereto belonging, or in any wise pertaining, for the use aforesaid, forever." *Held*, the words "for the use aforesaid" could not be construed as a condition in the grant, or a limitation to the estate. *Ibid.*
12. Letters-patent offered in evidence by the respondent, in the trial of feigned issues, for the purpose of showing want of originality in the complainants' invention, must be construed by the court; and if it appears that the patent so offered in evidence has no tendency to support the issue, it should be rejected as immaterial evidence. *Cahoon v. Ring*, 592.
13. It is the duty of the court to construe the plaintiff's patent, as a matter of law, and to instruct the jury in what his invention consists. *Ibid.*

See CHARTER-PARTY, 1-4.

CONTRACT.

1. Under a written contract to pay one tenth of the net profits after deducting expenses "that may appertain to the goods themselves," the expenses of clerk hire, advertising, and taxes were properly deducted from the gross amount. *Foster v. Goddard*, 158.
2. Under this contract, the respondent, who had the exclusive control of the accounts of the business, refused to receive a sum less than he considered due from a debtor of the concern, after the claim was barred by the statute of limitations, declined to allow the complainant to receive his proportion of the sum offered, and withheld from him the means of adjusting such proportion. *Held*, that respondent must account for complainant's proportion of the sum thus offered. *Ibid.*
3. Where, by the terms of a contract the respondent had the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit to be charged or credited in the general account, *held*, that respondent should account to the complainant for the profits made by him on the sale of a vessel built expressly for the business, though never used in it, but sold for a large profit soon after being launched. *Ibid.*
4. When the agreement under which a vessel was employed expired two months before her return, and while she was at sea, *held*, that her value must be computed, in determining the respective shares of the parties to the agreement, at what she was worth at the time of arrival, and not at the date of the expiration of the agreement, such appearing to be the intention of the parties, and that the burden was on the party contracting to pay a certain proportion of the value, to show that she was worth less at the time of her arrival than she was actually sold for two months after. *Ibid.*

5. At the expiration of an agreement, by its own limitation, claims to a large amount arising from transactions under the agreement were still outstanding and uncollected. The respondent, one of the parties to the agreement, claimed that the master, in making up the account under it, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and that henceforth they were to be regarded as his property, and at his risk. *Held*, that the master properly declined to adopt this theory, and justly allowed the complainant his portion of the profits made after the agreement expired. *Ibid*.
6. Wherever a contract is made in relation to patent rights, which is not provided for and regulated by an act of Congress, the parties, in case of dispute, stand upon the same ground as other litigants in respect to the jurisdiction of the court. *Blanchard v. Sprague*, 288.
7. Contracts made by the United States, through the Secretary of the Navy, to furnish provisions for the naval service, cannot be rescinded by the chief of the bureau having charge of such contracts and supplies, without the sanction of the head of the department. *United States v. Shaw et al.*, 317.
8. If a contract is to be sought in correspondence, or if the discharge of a right or obligation is to be deduced from it, then the court, and not the jury, must construe the correspondence, although it may extend over a considerable length of time, and embrace a great variety of circumstances. *Ibid*.
9. The respondents were employed by complainant to obtain a cargo for his vessel, and complainant alleged that respondents were employed to ship the entire cargo at specified rates, payable in money, which was denied in the answer; and after the vessel was loaded, and had departed on her voyage, the respondents sent to complainant a statement or freight list prepared as if the whole cargo had been shipped at specified rates of freight, upon which complainant thereupon paid the agreed commissions. *Held*, that as a portion of the cargo was in reality shipped at half profits, the making of the freight list amounted to a misrepresentation. *Delano v. Winsor et al.*, 501.

See CONSTRUCTION, 4, 5; SHIPPING, 8.

CONVEYANCE.

1. The granting clause of a deed was in the following words: "Give, grant, bargain, and sell . . . one of Baldwin's peg-splitting machines, and the right to use the same and of vending to others to be used, in the county of Cheshire, excepting the town of Hinsdale, being the same machine for which letters-patent were issued," &c. *Held*, the deed contained no words authorizing the grantee to construct any machine whatever; that it was a conveyance of a single machine already in existence, and of the right to use and sell that single machine within the described territory. *Baldwin v. Sibley*, 150.
2. Whenever a conveyance of a right under a patent is of a character to create an interest in the patent itself, it must be shown by an instrument in writing; while a license to make and use a machine, as it is not required to be recorded, need not be in writing; but such license conveys no interest in the

patent, and no power to authorize a third person to construct the patented invention. *Ibid.*

3. Consequently, oral declarations of a patentee, not made to the defendants, which, if admitted, would show an exclusive right within a described territory, in the person through whom defendants claimed to derive their right, were held inadmissible. *Ibid.*

COPYRIGHT.

1. The law does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright, for there may be a valid copyright in the plan of a book, as connected with arrangement and combination of the material, though all the materials employed, and the subject of the work, may be common to all other writers. *Greene v. Bishop*, 186.
2. Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alteration to disguise the piracy. *Ibid.*
3. It is not necessary that the whole of the larger portion of a work protected by copyright should be taken in order to constitute an infringement, but if so much is taken that the value of the original is materially diminished, or the labors of the original author appropriated to an injurious extent, such appropriation would amount to an invasion of the copyright. *Ibid.*

CORPUS DELICTI.

Where it is impossible to discover the body, the fact of death may be proved by other means. *United States v. Williams & Cox*, 5.

See CONFESSIONS.

CORRESPONDENCE.

See EVIDENCE, 17; CONTRACT, 8.

COSTS.

See INSURANCE, 9.

COUNSEL.

See NEW TRIALS, 2.

DAMAGES.

Where a personal injury is of a character to impair the ability of the person to labor, and especially when it is of a permanent character, it often becomes necessary to inquire into the condition in life and the pursuits of the injured person, in order properly to enable the jury to estimate the damages. *Wightman v. City of Providence*, 524.

See ADMIRALTY.

DEED.

See CONSTRUCTION, 7 – 11.

DEFENCE.

Evidence that the chief of a bureau informed a contractor that a written proposition to rescind a contract, if forwarded to him, would be laid before the Secretary, is no defence to an action to recover damages for the non-fulfilment of the same, although it appears that the proposition was duly made, and that it was retained six months, and not answered. *United States v. Shaw et al.*, 317.

See INSANITY, 1 – 3 ; COLLISION, 14.

DELIVERY.

1. Inasmuch as the delivery in this case was unconditional, the word “discharge” in the clause above quoted was held to refer to the unlading of the goods. *Sears et als. v. Bags Linseed*, 68.
2. When goods were placed on board a lighter in the employment of the master of a vessel, to be transported to the vessel, the delivery to the master was complete, and the liability of the vessel to which the goods were to be transported commenced. *The Bark Edwin v. Naumkeag Steam Cotton Co.*, 322.
3. Unaccompanied by any delivery of the goods, the contract of the master for their transportation creates no lien upon the vessel, and the contract cannot be enforced in the admiralty by a proceeding *in rem* against the vessel. *Ibid.*
4. Delivery of a vessel by the builders of the hull thereof to one as agent of the real owners, of itself vests no title in such agent, although the builders had no knowledge of the capacity in which the vessel was received by him. Unaccompanied by a written conveyance, such delivery must be understood as vesting the title in the real owners, and the taking of a bill of sale by such agent four months afterwards could not have the effect to divest the owners' title, and vest it in the agent. *Scudder v. Calais Steamboat Co.*, 370.
5. In the United States the title to a vessel may pass by delivery under a parol contract. *Ibid.*

See LIEN, 5 ; NOTICE, 1.

DEPOSITION.

See EVIDENCE, 12, 14, 15.

DIES NON.

See SHIPPING, 10, 11.

DISCHARGE.

See SHIPPING, 1, 2 ; POOR DEBTOR, 3.

DOUBLE USE.

See PATENT, 6.

DUTIES.

1. If goods from a foreign country have received damage in the course of the voyage, the importer, in order to obtain a reduction of duties, must demand an appraisal before entry. *Shelton v. Austin*, 388.
2. If he enter the goods at the custom-house at the invoice price before demanding an appraisal, he must pay duties assessed according to the invoice price, and is entitled to no reduction on account of the damage. *Ibid.*

See IMPORTS, 1 – 5.

EMBEZZLEMENT.

See SALVAGE, 10.

EQUITY.

1. Where a cause in equity was set down for hearing, and before any of the testimony was published, the complainant moved to dismiss his bill, and, no objection being made thereto, the motion was granted, and the bill in equity dismissed without any hearing upon the merits. *Held*, that the record of the former suit and decree was no bar to the bill of complaint. *Badger v. Badger*, 237.
2. A court of equity will not interfere to declare future rights which may arise under a will. *Cross v. DeValle et als.*, 282.
3. The rule which prevails at common law, that an alien can take lands by purchase, though not by descent, prevails also in equity. *Ibid.*

See PLEADING, 1 ; JURISDICTION, 6 ; WITNESS, 2 ; EVIDENCE, 14, 15, 21.

EVIDENCE.

1. Testimony in chief, of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. *United States v. Holmes*, 98.
2. Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account. *Ibid.*
3. Testimony merely rebutting is inadmissible, in anticipation of the matters to be contradicted or explained. *Ibid.*
4. Where evidence of acts, conduct, and declarations of the accused, at various periods of his life, is introduced in defence, to prove his insanity at the time of the commission of a crime, the prosecution, in rebuttal is not limited to an explanation or denial on the particular acts, conduct, or declaration so put in evidence in behalf of the prisoner, but may offer evidence of other acts, conduct, or declarations of the accused to show that he was sane within the same period. *Ibid.*
5. It is not necessary, in order to enable the proof of such other acts, conduct, and declarations to be regarded as rebutting testimony, that the prosecution should show the accused to be of sound mind at the time to which they refer. *Ibid.*

6. The defence being insanity, the evidence of such acts, etc., is not an attack upon the character of the prisoner before he has put his character at issue, but is rebutting testimony, admitted in order that the jury may compare the prisoner's conduct on different occasions together, and thus judge understandingly upon the question in controversy. *Ibid.*
7. Testimony legal in form, pertinent to the issue, and received without objection, cannot afterwards be stricken out by the court, merely because the foundation for its admission, by preliminary inquiry, has not been made. *Ibid.*
8. Where the expression of an opinion of a witness not qualified to speak as an expert is so interwoven with the *res gestæ* as to be inseparable therefrom, and was therefore rehearsed by the witness in his account of the circumstances of a homicide, *held*, that the statement that such expression was made was legal testimony, and as such was as much the subject of contradiction as any other competent testimony, and may be rebutted by proof of an inconsistent statement out of court. *Ibid.*
9. It is not necessary, in order to impart a rebutting character to testimony, that the contradiction should be complete and entire, but it is sufficient if it has a tendency to contradict or disprove the opposite statement. *Ibid.*
10. Evidence showing that defendants had, with the plaintiff's knowledge and without objection on his part, used their machine for a number of years, was held incompetent to establish an exclusive right in the person under whom defendants claimed to derive their right to use the machine in controversy. *Baldwin v. Sibley*, 150.
11. Parol proof of a lost memorandum, shown by the patentee to one of the witnesses, which memorandum contained a list of the rights sold by the patentee, and enumerated among others the conveyance of the exclusive right within a specified district to the person under whom defendants claimed, was held inadmissible. *Ibid.*
12. A deposition was taken after publication had passed, and upon interrogatories filed by leave of court, and application was made to the court to suspend the commission, but counsel consenting to strike out certain interrogatories, the motion was not pressed, and this motion to suppress was made at the final hearing. *Held*, under the circumstances of the case, and inasmuch as the commission issued by special leave of court after due notice, that the deposition ought not to be suppressed. *Patten v. Darling*, 254.
13. Of itself, the register is not evidence of property, unless confirmed by auxiliary circumstances to show that it was made by the authority or with the assent of the person named in it, and who is subject to be charged as owner. *Scudder v. Calais Steamboat Co.*, 370.
14. Depositions taken *de bene esse*, and without notice to the opposite party, in suits at common law, are not admissible in the trial of feigned issues out of equity, unless the same were sent down with the record of the issues framed on the equity side of the court. *Cahoon v. Ring*, 592.
15. After the decree ordering feigned issues has been entered, and the record of the same has been sent to the law court for the trial of the issues, the latter

court will not order that any depositions previously taken on the equity side, and not sent down with the record, shall be withdrawn from the files of the equity court, or that they may be admitted as evidence on such trial in the lay court. *Ibid.*

16. Where the feigned issues presented no issue of fraud or mistake, and the bill of complaint was founded exclusively upon the reissued letters-patent, it was held that the original letters-patent, if objected to, were not admissible on the trial of such issues. *Ibid.*
17. Office copies of the complainants' correspondence with the Commissioner of Patents pending the application for the reissue of the patent were also excluded as not pertinent to the question of novelty or of construction. *Ibid.*
18. Patents offered in evidence in the trial of feigned issues, and properly rejected as having no tendency to support any one of the issues, cannot be rendered admissible by any extraneous evidence. Such evidence, if from experts, may in certain cases be received in aid of the construction of the patent, but the rule still is, that the patent is not admissible, if it has no tendency to support the issue. *Ibid.*
19. Although the respondent is a competent witness in the trial of feigned issues, still he cannot be asked any question by the defence calling for testimony which contradicts his answer. *Ibid.*
20. Evidence of new experiments upon the machines in question, on the trial of feigned issues, in a patent suit, cannot be offered by the complainant in his rebutting testimony. *Ibid.*
21. Feigned issues out of equity having been ordered before the time for taking testimony had expired, the court sitting in equity refused to enter a final decree for the complainant, upon the verdict of the jury, which was in his favor, but gave the parties further time to take testimony under the equity rule. *Ibid.*

See CONVEYANCE, 3 ; DEFENCE, 1 ; CONSTRUCTION, 12.

EXCEPTIONS.

1. Exceptions to the report of a master should be so framed as not merely to allege error in general terms, but should indicate the particulars in which the error consists, in order that the court may understandingly decide upon each point in dispute. *Greene v. Bishop*, 186.
2. An exception which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, and makes no suggestion of mistake, fraud, or undue influence, cannot in general be considered as sufficient to put the finding of the master in issue, or to require the court to revise the same, in a matter depending entirely upon the weight of evidence. *Ibid.*
3. The party excepting to a master's report should require the evidence which furnishes the ground of the exception to be stated by the master ; if this is not done, the court will not enter at large into the evidence in order to ascertain if the master was correct in his conclusion. *Ibid.*

EXECUTOR.

An executor or administrator, deriving his authority solely from one State, cannot sue or be sued in his official character in another State for assets lawfully received by him in the jurisdiction where he was appointed. *Mellus v. Thompson*, 125.

EXPERIMENT.

See EVIDENCE, 12.

EXPERT.

See EVIDENCE, 18.

FAST DAY.

See SHIPPING, 10, 11.

FEIGNED ISSUES.

See CONSTRUCTION, 12 ; EVIDENCE, 14 - 16, 18 - 21.

FERRY-BOAT.

Ferry-boats, in crossing harbors of commercial ports in a fog, or in the night, should proceed with great caution. *Amoskeag Manufacturing Co. v. Steam Ferry-Boat John Adams*, 404.

FISHING-VESSEL.

1. A libel under the thirty-second section of the act of February 28, 1793, 1 Stat. at Large, p. 316, need not specify the particular trade in which the vessel was engaged at the time of the seizure ; it is sufficient, as a general rule, to bring the case within the words of the act of Congress. *United States v. Schooner Paryntha Davis*, 532.
2. Where a vessel was libelled for forfeiture for breach of a license to catch codfish, by catching mackerel at a certain time and place, *held*, that parol evidence might be given of her catching mackerel at other times and places during the trip, as showing the real business of the voyage. *Ibid*.
3. A fishing-vessel licensed to catch codfish cannot catch mackerel, except as bait or provision for the crew ; and this incidental privilege ought to be exercised fairly and in good faith. *Ibid*.

FRAUD.

See EVIDENCE, 16.

GUARANTY.

See CONSTRUCTION, 5.

HABENDUM.

See CONSTRUCTION, 11.

HALF-STORAGE.

1. Where importations were deposited by the importer in his own store, under the act of March 28, 1854, *held*, that the collector correctly required the importer to pay half-storage, under the Treasury Regulations, February 17, 1749. *Clark et al. v. Peaslee*, 545.
2. The regulations of July 2, 1855, did not have the effect to repeal those of February 17, 1849. *Ibid.*
3. Where there is no repealing clause, subsequent regulations only have the effect to repeal those previously existing, to the extent that the last issued are clearly repugnant to the former. *Ibid.*
4. Under the Regulations of February 17, 1849, the importer, before he can use his own store for the deposit of importations, must indorse on the entry an agreement to pay the collector an amount equal to the salary of an inspector, or one half storage, and the importer must make his election in advance. *Ibid.*
5. In the Treasury Regulations of July 2, 1855, the alternative provision for the payment of half-storage is dropped. *Ibid.*
6. The Regulations of 1857 provide that the importer shall pay monthly to the collector such sum as the collector deems proper for the service, not less, however, than the pay of the officer in attendance. *Ibid.*
7. Where an importer, under the act of March, 1854, elected to deposit the goods in his own store, *held*, that he was not deprived of that right by being required to pay half-storage, and that such requirement by the collector was properly made, as the store was "a private bonded warehouse," and the owner as importer was bound to pay "appropriate expenses." *Ibid.*

See WAREHOUSE, PRIVATE, 1.

IMPORTS.

1. It is very doubtful if the sixty-sixth section of the act of March 2, 1799, ever had any application to a case of importation and entry made by the manufacturer and producer, as such. *United States v. 26 Cases Rubber Boots*, 580.
2. By subsequent acts the basis of dutiable valuation has been changed from the actual cost to the actual market value or wholesale price. *Ibid.*
3. Persons who have purchased the goods, and have the means of knowing the cost, are still required to make oath that their invoices contain a true and faithful account of the actual cost; but this is not now applicable to the manufacturer, who is not supposed to have the means of knowledge to enable him to do so. *Ibid.*
4. By the act of March 1, 1823, provision is made for the importation of goods by the manufacturer, and the form of oath to be taken in such cases is there prescribed. It also makes discrimination between goods procured by purchase and such as are procured otherwise. *Ibid.*
5. By this act the sixty-sixth section of the act of March 2, 1799, so far as relates to importations by the manufacturer, if it ever had any application to that case, is repealed. *Ibid.*

IMPORTER.

See HALF-STORAGE, 1, 4, 6, 7.

INDICTMENT.

An indictment for murder on the high seas is sufficient, although it describes the grand jury as "jurors of the United States." *United States v. Williams & Cox*, 5.

INFRINGEMENT.

Where, as in this case, the only reservation made when the payment was received for the use of a patented machine was the right on the part of the patentee to claim an additional sum for such use of the machine, it cannot be held that the acts of the respondent in using the machine under such circumstances, prior to the time when such payment was made, were unlawful. *Blanchard v. Sprague*, 288.

See COPYRIGHT, 2, 3 ; PATENT, 18 - 20.

INJUNCTION.

Where a party, in accepting a certain rate of tariff on articles manufactured by his patented machine, reserved the right to claim a certain additional tariff on such articles, and claimed that by reason of such reservation he was entitled to receive such additional tariff as compensation for the use of his machine, *held*, the claim furnished no ground for an injunction, presupposing, as it did, that the use of the machine was not unlawful, but presented a case on which the complainant had an adequate remedy at law. *Blanchard v. Sprague*, 288.

INSANITY.

1. Although a person when committing a crime be laboring under partial insanity, if he still understands the nature and character of the act, and its consequences, and has knowledge that it is wrong and criminal, and mental power enough to apply that knowledge to his own case, and to know if he did the act he would do wrong and deserve punishment, such partial insanity is not sufficient to exempt him from criminal responsibility. *United States v. Holmes*, 98.
2. Such is the law of this court, and in many of the best-considered decisions in the State courts. *Ibid*.
3. Wherever partial insanity is set up as an excuse for crime, if it appears that the mind of the accused is merely weakened and clouded, but is not incapable of remembering, reasoning, and judging between right and wrong in respect to his particular act, to admit in such a case that he was impelled to the commission of the act by an uncontrollable impulse would be to disregard the test of responsibility which the law establishes. *Ibid*.

INSOLVENT LAW.

See POOR DEBTOR, 3.

INSURANCE.

1. Where goods are shipped to consignees, to be sold on commission, and the consignees, for their own benefit, insure their interest to an amount equal to the value of the goods, and the goods are lost, there is no privity of contract between the consignor and the insurance company on which a right of action against the company could be founded. *Bank of South Carolina v. Bicknell et als.*, 85.
2. Consignees of goods for sale on commission, being in advance to the consignors, or under acceptances for them, as in this case, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds to their own benefit to the extent of their claims in respect of such advances and acceptances, and perhaps of their commissions. But though they have this insurable interest, they are not, merely in their character as such consignees, vested with any authority to effect insurance for their principal on the consignment while it is in transit. *Ibid.*
3. When a policy of insurance contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the material statements in the answers of the applicant are thereby changed from representations into warranties. *Eddy Street Iron Foundry v. Hamden Stock & Mut. F. Ins. Co.*, 300.
4. A by-law which provides that any difference or dispute which may arise in relation to any loss sustained, or alleged to be sustained, by any person insured under a policy issued by an insurance company, shall be referred to and determined by certain referees; and in case any suit shall be commenced without such offer of reference, the claim of the party so commencing the suit shall be released and discharged, includes within the agreement for reference, not only the liquidation of the amount to be recovered, but also the question as to whether there has or not been any loss at all. *Trott v. The City Ins. Co.*, 439.
5. The effect of such a by-law, if it be valid, is to oust the courts of their jurisdiction. *Ibid.*
6. Such a by-law is void. *Ibid.*
7. Where the effect of such a by-law is to prevent the insured party from coming into a court of law, even though made a part of the policy by express agreement, it cannot be supported. *Ibid.*
8. Where a vessel, seized under a warrant from the District Court, continued in the custody of the marshal until the case was disposed of in the Circuit Court, the marshal had no right to effect insurance on the vessel, while so remaining in his custody, at the expense of either party, without their consent. *Burke v. Brig M. P. Rich*, 509.
9. Money paid by the marshal for such insurance cannot be allowed in the taxable costs. *Ibid.*

See WARRANTY, 1 - 3.

INVENTOR.

See PATENT, 12.

JUDGMENT.

1. A judgment of nonsuit even upon an agreement of facts cannot be pleaded in bar to a new suit, although rendered by a court of competent jurisdiction, between the same parties, and for the same subject-matter, as in the second suit. *Derby v. Jacques*, 425.
2. An agreed statement may be the proper foundation of such a judgment as will constitute a bar to a new suit between the same parties for the same cause of action. Judgments upon agreed statements of facts were unknown to the common law, but the general usage of the courts of Massachusetts has sanctioned this mode of trial, and it has become part of the common law of the State. *Ibid.*
3. Where a cause was submitted to the court under an agreed statement which among other things provided that "the court may make any other order or judgment in the case which they shall think it may require," *held*, that the whole controversy was submitted to the court without limitation; and that the court, having jurisdiction of the cause and of the parties, its judgment, until reversed, must be binding in every other court. *Ibid.*

JUDICIARY ACT.

By the 34th section of the Judiciary Act, it is provided that the laws of the several States, except in certain cases, shall be regarded as rules of decision in the courts of the United States in cases where they apply. *Derby v. Jacques*, 425.

JURISDICTION.

1. District Courts have no jurisdiction of a libel *in personam* against the builder, to recover damages for the non-completion of a ship, according to a written contract under which the ship was built and sold, for defects in the construction, discovered after the ship was sold and employed on a voyage. *Cunningham et al. v. Hall*, 43.
2. The jurisdiction of the District Courts is not limited to the particular subjects over which it was exercised in the English courts of admiralty, when the Federal Constitution was adopted; neither does it extend, under the Constitution and laws of Congress, to all cases which would fall within its cognizance, according to the civil law and the practice and usages of Continental Europe. *Ibid.*
3. The intent and meaning of the provision of the Federal Constitution, that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, must be determined in a great measure from the maritime law, as it was known and understood in the jurisprudence of the States when the Constitution was adopted. *Ibid.*
4. Discussion of the extent of the admiralty jurisdiction in the United States. *Ibid.*
5. The thirty-first section of the act of Congress of the 24th of September, 1789, confers no jurisdiction upon this court of a bill of revivor against the adminis-

trator with the will annexed, of the deceased respondent in the original suit, said administrator having been appointed by a probate court in California. *Mellus v. Thompson*, 125.

6. Equity jurisdiction will not be entertained in a case where the complainant alleges damages to his rights in consequence of the wrongful acts of the respondents; and where the whole case made in the bill is denied in the answer, unless the right of the complainant is clear and well defined, and there is danger of irreparable injury from the continuance of the nuisance, or unless, where the right is clear and the injury certain, an injunction is necessary to prevent multiplicity of suits or suppress interminable or oppressive litigation. *Parker v. Winnipiseogee Co.*, 247.
7. Circuit Courts have no jurisdiction to review the judgments or decrees of the Supreme Court; and a Circuit Court for one circuit is equally destitute of authority to review a judgment or decree of a Circuit Court in another circuit; but *semble*, a judgment or decree of the Supreme Court, affirming a judgment or decree of a Circuit Court, may be reviewed in a Circuit Court, upon proof that both judgments or decrees were obtained by fraud. *Clark v. Hackett*, 269.
8. Admiralty has jurisdiction over a contract of affreightment between two ports in the same State, where, from the usual course of the voyage, a part of the navigation of the vessel is upon the high seas, and out of the jurisdiction of any particular State. *Carpenter v. Schooner Emma Johnson*, 633.

JURY.

See VERDICT, 1 - 3.

LETTERS-PATENT.

See CONSTRUCTION, 12; EVIDENCE, 16.

LIBEL.

See PLEADING, 2 - 5; FISHING-VESSEL, 1, 2.

LICENSE.

When a patentee knowingly and for a considerable length of time acquiesced in the use of his patented machine by another who had previously constructed and used the same by his permission, and actually and voluntarily accepted a compensation for such use from the person in possession, as just payment for such use, those acts of the patentee were held to be evidence from which a license may be inferred, unless controlled by other facts and circumstances. *Blanchard v. Sprague*, 288.

See FISHING-VESSEL, 3.

LIGHT.

See COLLISION, 6, 7.

LIEN.

1. A lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills of exchange on one of the owners, which bills were produced in court to be surrendered or cancelled.
2. How far, according to the law of Maine and Massachusetts, the taking of a promissory note by a simple creditor is an extinguishment of the original debt. *Carter v. Townsend*, 1.
3. Where a portion of a cargo was delivered to the consignee, to be reshipped, and was accordingly shipped to another port, and the residue delivered to him without qualification, under the circumstances of this case, *held*, that the ship-owners' lien upon the part last delivered was displaced, notwithstanding a clause in the charter-party that "freight should be paid, one half in five, balance in ten days after discharge in Boston; said credit on payment of charter not to impair ship-owners' lien on cargo for freight." *Sears et als. v. Bags Linseed*, 68.
4. A carrier may, if he sees fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken. *Ibid*.
5. Pursuant to a contract of affreightment, part of a cargo of cotton was received at a wharf in Mobile, by the master of a ship lying below the bar, and was transported, in a lighter hired by him, several miles, to his vessel. While the lighter was alongside, her boiler burst, and the cotton, being still on board of the lighter, was destroyed. On this state of facts the court *held* that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor on the ship. This decision is not inconsistent with *Buckingham v. Schooner Freeman*, 18 How. 188; or *Vandewater v. Mills*, 19 How 90. *The Bark Edwin v. Naumkeag Steam Cotton Co.* 322.

See DELIVERY, 3.

LOOKOUT.

See PASSENGERS, 1.

MACHINE.

See PATENT, 12, 13, 16, 17.

MARSHAL.

See INSURANCE, 8, 9.

MISREPRESENTATION.

See CONTRACT, 9.

MODEL.

See PATENT, 15.

MOORED VESSEL.

See WATCH, 1.

MORTGAGE.

See NOTICE, 6, 7.

NEGLIGENCE.

Where a leak occasioned by an injury received by a vessel moored at a wharf had damaged the cargo because the leak was not discovered for some time after the accident, but where it at the same time appeared that two examinations of the injured vessel were made subsequent to the collision, and no indications of any injury below water could be discovered, *held*, that the damage to the cargo was not the result of negligence upon the part of those in charge of the injured vessel. *Amoskeag Manufacturing Co. v. Steam Ferry-Boat John Adams*, 404.

NEW TRIALS.

1. Circuit Courts of the United States have power to grant new trials, after conviction, for good cause shown, both in misdemeanors and felonies. *United States v. Williams & Cox*, 5.
2. Where counsel for the plaintiff, in the closing argument, adverted to facts not in proof, but the remarks were checked by the court, and the jury were instructed to confine their attention to the evidence in the case, the course of the counsel was held not to be sufficient ground for a new trial. *Wightman v. City of Providence*, 524.
3. Where evidence is given on both sides, and the verdict of the jury is satisfactory to the court, no extended argument will be made by the court in disposing of a motion for a new trial. *Bray v. Hartshorn*, 538.

See VERDICT, 1 – 3.

NOTICE.

1. When a carrier by water, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel, and of his readiness to deliver the cargo, unloads the same on a suitable wharf at a suitable time, and makes it ready for delivery, as by separating each consignment from the others, and placing them where they are conveniently accessible for the purpose of removal, such acts, if performed in good faith, have the effect to discharge the carrier from further liability as carrier, and entitle him to freight. *Salmon Falls Co. v. Bark Tangier*, 396.
2. Notice of the arrival of the vessel, and readiness to deliver, need not be delayed till the cargo is unloaded and all the acts performed which are requisite to discharge the carrier; it is more usual to give the notice when discharging is commenced; and when so given, it is not in general necessary that it should be repeated, if unloading is prosecuted without unnecessary or unusual delay. *Ibid*.

3. When no notice is given to the consignee until the cargo is discharged, it seems the responsibility of the carrier continues until a reasonable time in which to remove the goods has elapsed; but such is certainly not the rule where notice is given prior to the unloading. *Ibid.*
4. If the unloading be temporarily interrupted by the crowded state of the wharf, on account of other consignees not removing their goods, no new notice need be given on resumption of the work. *Ibid.*
5. Where prior notice is given, it is the duty of the consignee and carrier to co-operate, and the one who fails so to do must abide the consequences. *Ibid.*
6. Actual knowledge of the existence of a prior unrecorded mortgage has the same effect as if the mortgage had been duly recorded. *Lord Warren Evans & Co. v. Doyle et als.*, 453.
7. Where a person purchasing real estate gave back to his grantor a mortgage, to secure a part of the consideration money, and subsequently sold a portion of the property to certain third parties, with the agreement that they should assume a certain proportion of the liabilities to which it was subject up to the time of such sale, and among such liabilities was the mortgage to his original grantor; *held*, that the subsequent purchasers had sufficient knowledge of the prior unrecorded mortgage. *Ibid.*

See SHIPPING, 9.

PARTNERSHIP.

1. When two or more persons agree that each shall contribute capital or labor for the purpose of carrying on a business, and that the profits shall enure to their joint benefit, and be subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement, and even though they may have expressly stipulated to the contrary. *Bigelow et als. v. Elliot & Hovey*, 28.
2. Community of profit is the true criterion whereby to determine whether any agreement for the carrying on of business constitutes a partnership; but if one receives as a compensation for his services, or as rent, a stated portion of the profits, as a measure of the amount of his salary, or the mode of payment, he will not on that account be liable as a partner. *Ibid.*
3. Where one participates in the profits of a business, ostensibly carried on by another, he is equally liable, when discovered, for debts of the concern, contracted during the time of such participation, to creditors without knowledge of the actual relations of the parties when the credits were given. Partnership in such cases is a conclusion of law upon the facts; but secrecy on the part of the dormant partner, and want of knowledge of the actual relations of the parties on the part of the creditor, are essential elements of the liability. *Ibid.*
4. Dormant partners, or those held to be such by mere implication of law, need not in any way give notice of the dissolution of partnership. *Ibid.*
5. Where two persons, by virtue of a private agreement, became partners as to

third parties, the contract specifying no firm name, but allowing each partner to purchase goods on his own individual credit, and designating one of the two to transact the business, while the connection of the other was kept secret, *held*, that the dormant partner was not liable, on a note, for goods put into the concern by the one who conducted the business, and signed with his name, where the signature was not intended as that of the firm, and the payee was ignorant of the relation of the parties. *Palmer et als. v. Elliott & Hovey*, 63.

PASSENGERS.

Passengers cannot be regarded as lookouts in any sense known to the maritime law, certainly not unless specially designated by the master for such purpose. *Amoskeag Manufacturing Co. v. Steam Ferry-Boat John Adams*, 404.

See SHIPPING, 1, 3.

PATENT.

1. The patent issued to Charles Goodyear, June 15, 1844, for improvement in india-rubber fabrics, reissued December 25, 1849, and extended for seven years, June 15, 1858, was for the product known as vulcanized rubber, as well as for the process by which it was produced. *Goodyear v. Beverly Rubber Co.*, 348.
2. When the patentee sells the right to make, use, and vend the invention in a particular place, the purchaser buys a portion of the franchise which the patent confers; but the purchaser of a patented implement or machine for use in the ordinary pursuits of life stands on a different ground. *Ibid.*
3. By virtue of the contract of sale and the unconditional delivery of a patented article, it passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. *Ibid.*
4. When the patentee of certain processes and the product thereof, for a valuable consideration, sold the patented article, both the manufactured article and the materials of which it was composed passed to the purchaser, discharged of the peculiar privileges secured by the patent; and the purchaser may use the material in the manufacture of other articles not themselves protected by a patent. *Ibid.*
5. And this is the case, although the patented article was bought of the patentee's licensee, who was restricted by the license to a use of the patented product different from that to which it was devoted by the purchaser. *Ibid.*
6. Where the claim rests upon the application of an old invention, process, or machine, &c., to a new use, the patent cannot be sustained. *Bray v. Harts-horn*, 538.
7. New contrivances applied to old purposes are patentable. But particular changes may be made in the construction and operation of an old machine, so as to adapt it to a new and valuable use, when it may be the subject of letters-patent. *Ibid.*
8. Such change may consist of a new and useful combination of the several

parts of which it is composed ; it may consist in a material alteration or modification of one or more of the several devices which enter into its construction, or it may consist in adding new devices. *Ibid.*

9. Where the claim is of this kind, the patentee must distinguish the new from the old. *Ibid.*
10. The claim in this case is for a new and useful method of balancing curtains in the manner and by the means described in the specification, to wit, by a new combination. It is not necessary that any one of the devices or elements so combined should be new, provided the combination is new, and produces a new and useful or a better result. The words "for the purpose," in the claim of the plaintiff's specification, were employed, in combination with others, as descriptive of the operation of the described machine, and of the new and useful result it was adapted to produce, and not of any new use to which the machine was to be applied. *Held*, that the plaintiff in this case had fully complied with the requirements of the act of July 4, 1836, in regard to the description and specification of his invention. *Ibid.*
11. In order to invalidate the patent of the complainant, the respondent must show that some one, prior to complainant's invention, had invented a machine for the same purpose, containing the several improvements which the complainant claims, or some of them ; but the complainant's patent is valid for such of the several improvements claimed as are not thus shown to have been first invented by another. *Cahoon v. Ring*, 592.
12. Complainant being the alleged inventor of a machine for discharging seed broadcast, in vertical planes, perpendicular, or nearly so, to the line of travel of the machine, and by means of centrifugal force, *held*, that, in order to invalidate the complainant's patent by machines or models introduced at the trial, they must be shown to be machines operating like the complainant's, by means of an apparatus constructed, arranged, and operating substantially in the same way. *Ibid.*
13. A prior machine for discharging seed in horizontal planes, although, by certain modifications of its construction and arrangement, it could be adapted to discharge seed in vertical planes, does not necessarily embody the principles and mode of operation of the complainant's invention, if he be found to be the first to invent and adapt an apparatus for sowing seed in vertical planes. *Ibid.*
14. Such prior machine would not anticipate that of the complainant if it required invention to make the necessary modifications in the construction and arrangement. *Ibid.*
15. Models made and used merely as experiments, and which were not capable of being used for agricultural purposes, cannot affect the complainant's patent, although it appears that they were made prior to his invention, and were capable of being operated for the purpose of such experiments. *Ibid.*
16. *Held*, also, that machines previously constructed, but never made public, and used only as private experiments, and then broken up, and the essential materials appropriated for other purposes and ultimately lost or abandoned,

could be no obstacle to the right of the complainant to take out a patent, if he had no knowledge of such prior invention. *Ibid.*

17. Difference in size and proportion of devices or machines, so long as the construction, principles, and mode of operation are the same, is entirely immaterial. *Ibid.*
18. In order to determine a question of infringement between two machines, the jury are to look at the machines and compare the same, or their devices, in the light of what they do, or what office or function they perform, and how they perform it. *Ibid.*
19. Inquiry must be directed more particularly to those portions of a given part which really do the work, in preference to other portions of the same part which are only used as convenient methods of constructing the whole part. *Ibid.*
20. If two machines do the same work, by substantially the same means, in substantially the same way, and accomplish substantially the same result, they are the same. *Ibid.*

See CONSTRUCTION, 12, 13; EVIDENCE, 14, 20.

PAYMENT.

See PROMISSORY NOTE, 1 - 8.

PILOT.

1. Under the English statute, which declares owners not to be liable for loss or damage occasioned by the neglect or incompetency of any licensed pilot in charge of the vessel, it was formerly held, if there was neglect in the management of a vessel, and a pilot was on board, the neglect was, *prima facie*, attributable to him; but the rule is now settled, that, in order to bring their case within the statute, the burden is on the owners to show the pilot alone in fault. *Camp v. Ship Marcellus*, 481.
2. Vessels, whether going in or coming out of a harbor, are not, by the laws of Massachusetts, positively bound to employ a pilot. *Ibid.*
3. While on board, in the absence of the master, the pilot has exclusive control of the navigation of the vessel; but if the master is present, his authority is not so far superseded by the pilot's power that he cannot interfere in case of gross ignorance or palpable and dangerous mistake. *Ibid.*
4. Parties who suffer by a collision are entitled to have their remedy against the vessel occasioning the damage, and are not under the necessity of looking to the pilot for compensation. *Ibid.*

PLEADING.

1. When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, without being replied to by the complainant, all the facts therein alleged, which are well pleaded, must be considered as admitted, for the purpose of determining whether the plea constitutes a sufficient answer to the suit. *Mellus v. Thompson*, 125.

2. In an action of libel, if the defendant intends to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, he must plead it specially ; he cannot give in evidence the truth of the imputation without pleading such truth as a justification. *Barrows v. Carpenter*, 204.
3. Where the charge is general in its nature, the defendant in a plea of justification must state some specific instances of the misconduct imputed to the plaintiff, but irrelevant matter will not vitiate, even on special demurrer. *Ibid.*
4. It is sufficient if the defendant's plea answer the whole substance of the plaintiff's declaration. *Ibid.*
5. The plea is required to state the substantial facts which constitute the elements of the charge when it is general. *Ibid.*
6. A plea which sets forth proceedings in a former suit and a judgment in favor of the tenants, with profert of the record, and also states that the demandant, subsequent to the rendition of the judgment, made application to the court to amend the record by entering judgment for the tenants as upon a nonsuit, which application the court heard and refused, is not double ; and that part of the plea which states the application being entirely immaterial, and not in any possible view affecting the question whether the judgment was or was not a bar (the record being wholly unaffected by the application), may be rejected as surplusage. *Derby v. Jacques et al.*, 425.

See SALVAGE, 2; ANSWER, 1, 2.

POOR DEBTOR.

1. Under the 195th chapter of the laws of Maine, approved March 24, 1835, for the relief of poor debtors, if a debtor arrested on execution select one of two disinterested justices of the peace and of the quorum himself, and if the other was selected by the officer at the request of the debtor, it is a substantial compliance with the requirements of the act, and the selection must be considered as the act of the debtor himself. *Buckley v. Page*, 474.
2. When such justices have jurisdiction, their certificate, required by the statute, that the debtor has caused the creditor to be duly notified according to law, is conclusive, the statute making them the judges of the regularity of the preliminary proceedings, and, in the absence of fraud, other evidence to control the adjudication of the justices is not admissible. *Ibid.*
3. A discharge of a debtor under a State insolvent law is invalid against a creditor or citizen of another State who has never voluntarily subjected himself to the laws of the State where the discharge was obtained, otherwise than by the origin of his contract, and the plea of such discharge is insufficient to bar the rights of the plaintiff. *Hale v. Baldwin*, 511.

PROMISSORY NOTE.

1. In Massachusetts, when a debtor gives his own negotiable bill or note for a pre-existing debt, it is *prima facie* evidence of payment. *Palmer v. Elliott & Hovey*, 63.

2. But this presumption may be rebutted by circumstances showing that such was not the intention of the parties, — or if the paper accepted is not binding upon all the parties previously liable, — or where there is fraud, concealment, misapprehension, and great unfairness in giving the security. *Ibid.*
3. Under such circumstances the holder is at liberty to surrender the note to the party who gave it, or place it on the files of the court for that purpose, and will then be entitled to recover on the original contract. *Ibid.*
4. At common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was so given. *Baker et als. v. Draper et al.*, 420.
5. In this case the transaction must be governed by the rules of law which prevail where it took place; and in Massachusetts, where a party, bound to a simple contract debt, gives his own negotiable security for it, it is presumed as a matter of fact, in the absence of any circumstances to indicate a contrary intention, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. *Ibid.*
6. Such rule should be cautiously applied in all cases where the remedy upon the new security is not as good and effectual as upon the one for which it was substituted. *Ibid.*
7. If there is any deception or fraud in the giving the new security, or if it was accepted without full knowledge of the facts, the plaintiff is not bound by the acceptance, but may tender it back or produce it in court to be cancelled, and seek his remedy on the original contract. *Ibid.*
8. Where the libellants, in Massachusetts, took a note for the amount of certain supplies furnished to a vessel, from a person whom they supposed to be one of the owners, but which person had previously given a bill of sale of his share in the vessel to certain third parties, to secure them for liabilities they had incurred for him, which was not at the time known to the libellants, *held*, that the libellants did not take the note in satisfaction and in discharge of the original liability of those to whom the credit was given, or with full knowledge of all the material facts. *Ibid.*

See LIEN, 2; AGENT, 1, 3.

PURCHASER.

See SHIPPING, 9.

RECORD.

See NOTICE, 6, 7.

REGISTER.

See EVIDENCE, 13.

REISSUE.

See EVIDENCE, 16, 17.

REMEDY.

See CONTRACT, 6.

REVIVOR.

See JURISDICTION, 5.

SAILING VESSEL.

See COLLISION, 4, 5, 9, 11 ; SHIPPING, 4 - 6.

SALE.

See PATENT, 2 - 5.

SALVAGE.

1. In order to bar a claim for salvage there must be a distinct agreement proved between the parties for a given sum, to be paid whether the property be lost or not. It is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested to aid in saving it. *Adams v. Bark Island City and Cargo*, 210.
2. The mere fact that a libellant alleges his claim to be "in a cause of contract civil and maritime, and for extra services rendered" to the vessel libelled and her crew, will not prevent such claim from being regarded as one for salvage, if it appears, from the general scope of the several allegations of which the libel is composed, that such is in reality the character of the claim. *Ibid.*
3. Where three sets of salvors at different times rendered services to a vessel during a continuous peril, each was held entitled to compensation, although the separate service of either would not alone have saved the vessel in distress. *Ibid.*
4. Where three sets of salvors contributed in rescuing a vessel from peril, which vessel with her cargo was valued at \$ 70,000, the joint value of the several vessels engaged being \$ 131,000, and the whole time employed some fifteen days, the amount of salvage decreed to all the salvors was \$ 13,000, of which sum \$ 5,200 was decreed to the libellants in this case, it appearing that their vessel was worth \$ 85,000, and that she was employed some thirteen days in the service. *Ibid.*
5. A dismasted bark, without rudder, having no anchor attached to her chain, in a severe storm, was taken by a schooner to a safer position and there left ; and upon the arrival of the schooner in port, intelligence of the condition of the bark was transmitted to the owners. The bark was saved by another vessel. *Held*, that the services of the schooner entitled her to a liberal compensation. *Norris v. Bark Island City and Cargo*, 219.

6. The duration of the schooner's service was twenty-four hours; her value with her cargo, \$ 8,500; the vessel relieved by her was worth \$ 70,000. Salvage compensation decreed to libellants and petitioners in this case, \$ 3,300. *Ibid.*
7. A dismasted bark in tow of a steamer was anchored and left for a necessary and temporary purpose. The officers and crew of the bark went on board the steamer; but nothing was taken out of the bark, it being the intention to return and take her to a place of safety at the earliest practicable moment, which intention was carried into effect. *Held*, the bark was not derelict when found by another vessel, during the steamer's absence. *Cromwell v. Bark Island City and Cargo*, 221.
8. But when a party finds property thus temporarily left, whether from necessity or other cause, and he takes possession of it with the *bona fide* intention of returning it to the owner, and if by his exertions he contributes materially to the preservation of the property, he will be entitled to remuneration as a salvor, according to the merits of the service. *Ibid.*
9. In this case the vessel saved was, with her cargo, worth \$ 70,000; the steamer that rendered the service, with her cargo, \$ 90,000. Salvage decreed to the owners of the steamer, \$ 1,500; and in the absence of any charge of embezzlement or theft, \$ 3,000 would have been adjudged to the officers and crew. *Ibid.*
10. But where all, or nearly all, the personal effects of the officers and crew of the bark saved were embezzled, locks being broken, chests and trunks forced open, and these acts of plunder committed by the crew of the rescuing steamer, under circumstances which showed that her officers either connived at them, or were grossly negligent in failing to prevent them, and in not causing the property to be restored, *held*, that the salvage that would otherwise be decreed to the officers and crew of the steamer was forfeited to the owners of the property saved. *Ibid.*
11. The failure of libellants to refer their claim for salvage, as agreed, was held, under the circumstances of this case, to be no bar to the suit, and could only be taken into the account as evidence to reduce the amount which libellants were entitled to recover. *Coffin v. Schooner John Shaw and Cargo*, 230.
12. Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim. *Ibid.*
13. *Obiter*. A proposition by salvors that, in case they were unsuccessful in raising the vessel, they should have the privilege of stripping her, being made in advance of any effort by them to save the vessel, was highly objectionable, and must be regarded as detracting very materially from the merit of their service. *Ibid.*
14. That the risk was slight, and the duration of the salvage service comparatively brief, affect the value of the same, and the amount to be allowed, but cannot be a bar to the claim. *Ibid.*

SHIPPING.

1. Where a seaman had attempted a rape upon a female passenger in a foreign port, and the injured party refused to remain on board, and demanded the return of her passage-money unless the offender was dismissed, the master was justified in the immediate discharge of the seaman. *Nieto v. Clark*, 145.
2. Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of Congress or the courts of the United States, and in such cases the burden is upon the master to show the reasons of the discharge, and to prove to the satisfaction of the court that they were just and reasonable. *Ibid.*
3. The contract of all passengers entitles them to respectful treatment from those in charge of the vessel, and, in respect to female passengers, includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest approach. *Ibid.*
4. A vessel that has the wind free, or is sailing before or with the wind, must keep out of the way of a vessel that is close hauled, or sailing by or against the wind. *Pope v. Steamboat R. B. Forbes*, 331.
5. The vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. *Ibid.*
6. As a general rule, when a steamer meets a sailing vessel, whether the latter is close hauled or with the wind free, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid a collision. *Ibid.*
7. Steamers are always under obligation to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances; and their obligation extends still further, because they have a power to avoid collision, not belonging to sailing vessels even with a free wind. *Ibid.*
8. Under a contract for building an entire vessel, no property vests in the party for whom the vessel is built, until she is ready for delivery, and has been approved or accepted by such party; but that general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent, and payments for her, based upon the progress of the work, are to be made by instalments as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner. *Scudder v. Calais Steamboat Co.*, 370.
9. A purchaser of a vessel from a person holding the same in trust for the real owners, having notice of the trust, is in no better situation than the seller. *Ibid.*
10. Under the decision of the Supreme Court in *Richardson et al. v. Goddard et al.*, 23 Howard, the master of a merchant vessel is fully authorized to continue and complete the discharge of his cargo, and the delivery of the respective consignments on Fast-day, when he had commenced the work prior to the occurrence of that day. *Pierson v. Richardson*, 383.
11. For the purpose of lading or unlading ships engaged in maritime commerce,





